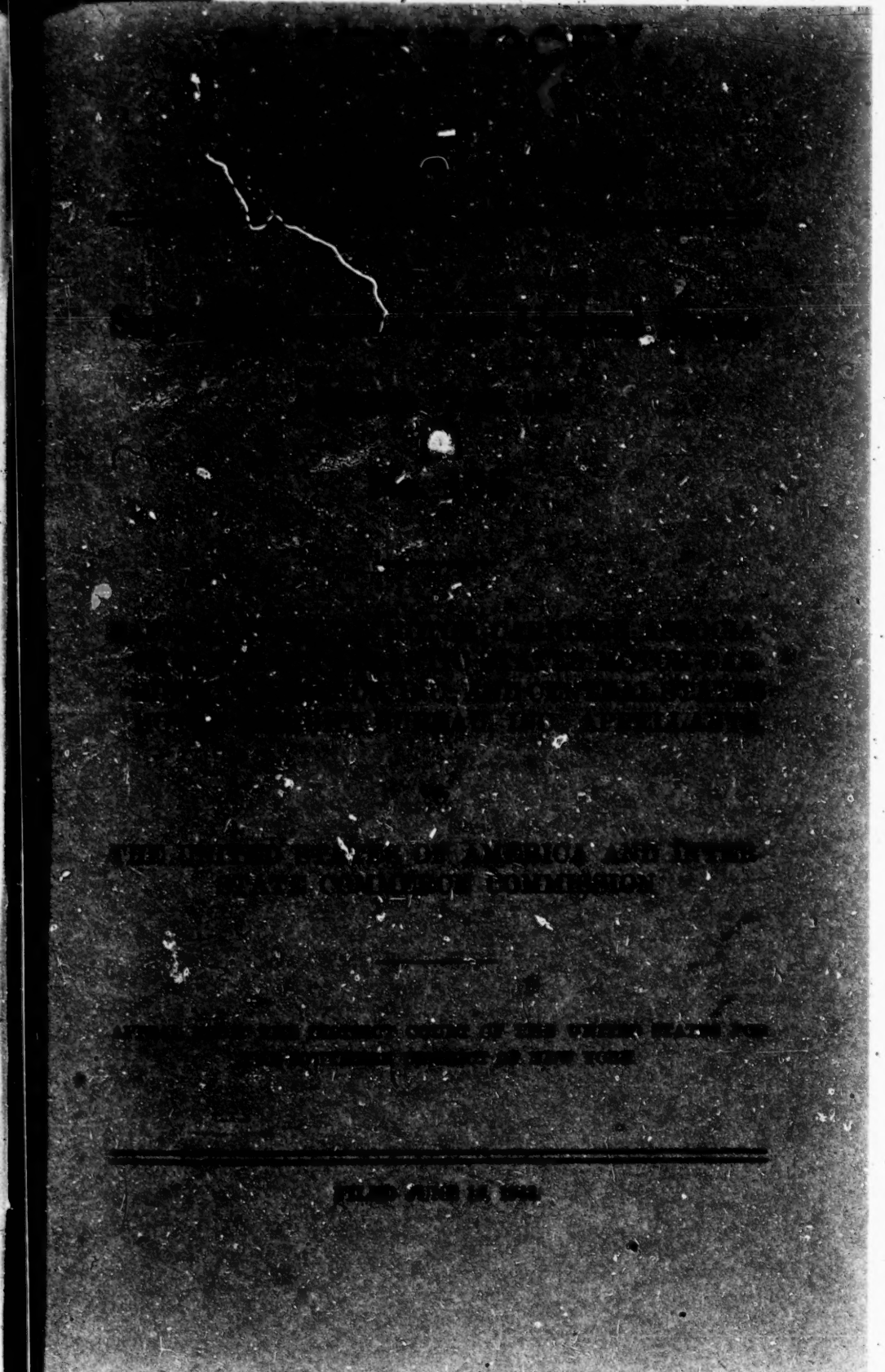

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., AND CENTRAL STATES MOTOR FREIGHT BUREAU, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from D. C. U. S., Southern District of New York	2	1
Petition	2	1
Exhibit "A"—Report and order of Commission—Division 3, Nov. 17, 1941, Docket No. M-1216	12	9
Exhibit "B"—Report of full Commission upon review, Aug. 11, 1942, Docket No. M-1216	22	21
Stipulation as to hearing, etc.	(omitted in printing)	31	
Answer of United States of America	32	33
Answer of Interstate Commerce Commission	36	35
Exhibit No. 1—Report of Commission, Aug. 11, 1942 (copy)	(omitted in printing)	41-A	
Petition in intervention of Middle Atlantic States Motor Carrier Conference, Inc., et al.	(omitted in printing)	42-A	
Notice of settlement of proposed findings of fact and conclusions of law	(omitted in printing)	42-B	
Findings of fact and conclusions of law	43	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1943.

Record from D. C. U. S., Southern District of New York—Continued	Original	Print
Opinion, Hand, J.	47	41
Decree and judgment	52	44
Stipulation as to decree and judgment (omitted in printing)	52-A	
Waiver of costs (omitted in printing)	52-B	
Motion of plaintiffs for rehearing (omitted in printing)	52-C	
Affidavit of counsel re motion for rehearing (omitted in printing)	52-D	
Order denying motion for rehearing (omitted in printing)	52-E	
Notice of Appeal (omitted in printing)	52-F	
Petition for Appeal (omitted in printing)	52-G	
Assignment of Errors	53	45
Order Allowing Appeal	57	48
Bond on Appeal (omitted in printing)	57-A	
Certificate of Service of appeal papers (omitted in printing)	57-B	
Order to transmit original documents (omitted in printing)	57-C	
Citation (omitted in printing)	57-D	
Praecipe for record and amendment thereto (omitted in printing)	57-E	
Clerk's Certificate (omitted in printing)	57-F	
Plaintiff's Exhibit No. 1—Transcript of hearing before Interstate Commerce Commission, Docket No. M-1216	60	49
Caption and appearances	60	49
Colloquy	63	50
Testimony of L. M. O'Leary	66	52
Exhibits 1 to 5 inc.—Rate statements (omitted in printing)	86-A	
Defendants' Exhibit "A"—Transcript of oral argument before Interstate Commerce Commission, Docket No. M-1216 (omitted in printing)	86-B	
Statement of points to be relied upon and designation of parts of record to be printed	87	65
Designation of additional parts of record to be printed	94a	70
Order noting probable jurisdiction	97	71

[fols. 1-2]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-390

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, Plaintiff

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

PETITION—Filed October 13, 1942

The petition of Eastern Central Motor Carriers Association respectfully shows unto the Court as follows:

I

Plaintiff is a non-stock, non-profit voluntary membership corporation organized and existing under and by virtue of the laws of the State of New York. Its membership consists of numerous common carriers of property for hire by motor vehicle engaged in transportation of property in interstate and foreign commerce between places in Eastern Trunk Line Territory (including New York City in the Southern District) and New England, on the one hand, and points and places in Western Trunk Line Association and Central Freight Association territories, on the other hand. Plaintiff is by its articles of incorporation authorized by the laws of the State of New York to sue and be sued. In addition thereto it is the duly constituted agent of its membership, in their behalf, to prepare and file with the Interstate Commerce Commission tariffs and freight charges as required [fol. 3] by law covering the interstate and foreign transportation of property by its members and to appear and represent such members in any proceedings before the Interstate Commerce Commission concerning such tariffs and the rates and charges contained therein.

II

The defendant, United States of America is sued in this proceeding as a statutory defendant under and by virtue of

an Act of Congress directing and authorizing suits of this character seeking to annul, set aside and enjoin enforcement of orders of the Interstate Commerce Commission so to be instituted; and the defendant Interstate Commerce Commission is an administrative body created by an Act of Congress, February 4, 1887, and under later amendments possessing in general the power of regulating the rates, charges, and rules of common carriers of property for hire by motor vehicle in interstate and foreign commerce.

III

Bearing effective dates of August 24, 1940 and January 25, 1941 plaintiff, through its general manager, E. H. Russell, as agent, filed with the Interstate Commerce Commission tariff schedules for the corporate members containing new and reduced rates on hard surface floor covering including carpets, carpeting, door and floor mats and laying sundries and accessories, from various points in Eastern Trunk Line and New England territories (including New York City in the Southern District), to various points and communities in Central Freight Association and Western Trunk Line territories. Prior to the effective dates of such new and reduced rates the Interstate Commerce Commission, by order of Division 2 thereof, entered upon an investi- [fol. 4] gation of their lawfulness; and pending the hearing and decision therein said Division 2 ordered that the operation of such new and reduced schedules be suspended, as authorized by law. In due course a hearing thereon was held in the city of Columbus, Ohio on March 21, 1941. Thereafter on November 17, 1941, there were made and entered a report and order of the Commission by Division 3 thereof in which it was determined that the said schedules would be unlawful and respondent motor carriers, members of the plaintiff corporation and their agent, were directed on or before December 24, 1941 to cancel such schedules. Plaintiff was a party to such proceedings before Divisions 2 and 3. On December 13, 1941, plaintiff and the motor carrier respondents petitioned for reconsideration and rehearing of such decision and order, which was denied. Thereupon the suspended schedules were canceled as ordered by Division 3 but plaintiff and other respondent motor carriers then renewed their endeavor to obtain reconsideration. Such reconsideration thereafter was granted by

the full Commission, and the matters and things involved were further briefed and orally argued before the full Commission on May 28, 1942. On August 11, 1942 the full Commission (ten Commissioners participating) by a vote of seven to three affirmed the action of Division 3 in ordering cancellation of the suspended schedules but made new findings and predicated the decision upon new and different findings and conclusions of law. No further order was necessary as the prior order of Division 3 remained in effect.

IV

As authorized by law this action is instituted against the United States of America and the Interstate Commerce Commission to annul and set aside such order and to enjoin [fol. 5] its enforcement. A copy of the report and order of Division 3 dated November 17, 1941, is attached hereto and made a part hereof being marked Exhibit A; and a copy of the report of the full Commission upon review, dated August 11, 1942, is attached and made a part hereof being marked Exhibit B.

V

In and by the said schedules so ordered canceled, the following condition of rates was undertaken to be brought about: With respect to so-called less than truckload shipments of the involved commodities, consisting of small weight shipments, the then existing rates would remain as formerly in effect i.e. 70% of first class; when shipments might be tendered in quantities of not less than 20,000 pounds but less than 30,000 pounds 47½% of first class; and on shipments tendered in quantities of 30,000 pounds or more 45% of first class. Such alternative rates were offered to any member of the shipping public without any restriction whatsoever other than that to be entitled to the benefits of either the 47½% or 45% of first class rates it was required that the quantities tendered must be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

VI

In and by its decision of August 11, 1942, not disturbing the November 17, 1941 order of Division 3, it was concluded by the majority of the full Commission that the slightly

lower rates of 45% of first class, to be available on shipments weighing 30,000 pounds or more, would give an unjust advantage to shippers of such quantities and be unjustly discriminatory to shippers of quantities weighing less than 30,000 pounds but more than 20,000 pounds upon which the suspended rates would 47½% of first class. [fol. 6] There was no conclusion with respect to any matter of unjust advantage or discrimination as between small lot less than truckload shipments and the larger lot shipments to be covered by rates equal to 47½% or 45% of first class.

VII

Plaintiff respectfully shows unto the Court that such conclusion of a majority of the Commission as to unjust advantage and unjust discrimination as between shippers is, as a matter of law, erroneous on its face. Both the ratings of 47½% and 45% of first class would be equally available to any shippers at their own option dependent only upon the quantities they might choose to ship at one time on one bill of lading. Any and all shippers would have the benefit of choice. There is and can be no unlawful advantage and discrimination and violation of any provision of the Interstate Commerce Act which accords to any and all shippers equal opportunities and entitles each to the benefit of a mere choice as between a lower and higher rate dependent only upon a difference in the quantity shipped at one time. There was no finding that practical availability of the rating of 45% on shipments of 30,000 pounds or more would be confined only to a limited few shippers as against a large mass of shippers whose course of business would confine them to smaller shipments weighing between 30,000 and 20,000 pounds.

VIII

No shipper appeared at the public hearing of said proceedings held in Columbus, Ohio, March 1, 1941 to interpose any objection to the involved schedules nor did any shippers submit any evidence at that hearing showing or attempting to show any shurtful discrimination or undue advantage that would result from the openly published choice of rates [fol. 7] offered by respondents. The only protestants at such hearing were certain railroads who, in the course of

the hearing, withdrew their protest and withdrew from the proceeding before it was concluded. There was no record before the Commission on which to base a conclusion of undue advantage or discrimination as between shippers because of the offer of an alternative rate and minimum weight openly published for availability to all.

IX

In and by its report of August 11, 1942 the Commission majority found that the rating of 45% of first class undertaken to be made effective by the respondent motor carriers, to be available on shipments weighing not less than 30,000 pounds, was attributable to and was caused by the competition of equivalent rates and minimum weights of railroads operating between the same origins and destinations. Plaintiff respectfully shows unto the Court that under the Interstate Commerce Act in the absence of special findings hereinafter to be referred to it is the lawful right of common carriers of property for hire by motor vehicle to adapt their rates and the limitations upon their availability to those already in effect by railroads between the same origins and destinations in order to compete fairly and not be deprived of the privilege of participating in the traffic. The majority of the Commission erred as a matter of law in holding and determining that such defense of competition is not available under the statute and is not a legal justification for a difference of rates as between different quantities shipped. There was no finding that the competitive exertion in this instance would have a destructive effect; there was no finding that the earnings of the motor carrier respondents thereunder would be so unduly low as to cast a burden upon their other traffic; there was no [fol. 8] finding that the suspended schedules containing the rating of 45% of first class on shipments of 30,000 pounds or more went beyond competitive requirements; and there was no finding that in any other respect would the National Transportation Policy be impaired by such meeting of competition by plaintiff's member motor carriers.

X

On the contrary the conclusion of the majority of the Commission was only that it would not "as a matter of policy" in this or any other case accept and apply the defense of

competition under such circumstances whenever it might so appear, as in this situation, that to accommodate loadings of 30,000 pounds or more motor carriers would, in many instances, be required to utilize some parts of the carrying space of more than one motor vehicle. Plaintiff respectfully alleges that the Interstate Commerce Commission wholly lacks the power to deprive motor carriers of the defense of competition with railroads merely "as a matter of policy" in cases of claimed undue advantage or discrimination as between shippers.

XI

Plaintiff further respectfully shows to the Court that the report and decision of the full Commission majority is capable of being construed to mean that the privilege of motor carriers to meet the competition of railroads was not denied in respect to the rating of 45% of first class, minimum weight 30,000 pounds, if such rating stood alone but that unlawfulness would attach to such rating when accompanied by the privilege of shippers to tender less than 30,000 pounds but not less than 20,000 pounds at a rating of 47½%. If such be a correct construction of the intent of the full Commission majority, error is committed thereby because the rating of 45%, minimum weight 30,000, if otherwise lawful due to the meeting of railroad competition, is not rendered unlawful because the respondent member motor [fol. 9] carriers voluntarily elect to offer to shippers a slighter higher but reasonable rate to be available on shipments weighing less than 30,000 pounds but not less than 20,000 pounds.

XII

In its determination of unjust advantage and discrimination as between shippers in respect of the two ratings of 47½% and 45% of first class, the Commission majority declared the rule of law to be that notwithstanding competition may compel the lower of the two ratings the offer of both would constitute unjust advantage and discrimination as between shippers unless the lower of the two ratings was justifiable because of lower operating expenses, which it was said was not proved on the record. Plaintiff respectfully alleges that the majority of the Commission thereby committed error of law for the reason that the defense of

competition as against a contention of advantage and discrimination is not qualified in law by the need to predicate a difference of rate upon a difference of cost of operations.

XIII

In its report and decision the Commission majority found that both the 47½% and 45% of first class ratings would be just and reasonable in amounts if dissociated from the difference in minimum weights undertaken to be applied in connection therewith. It was determined, however, that the lower of the two ratings would be unjust and unreasonable because in many instances as much as 30,000 pounds of the involved commodities could not legally be loaded in a single motor vehicle and an overflow of part of the shipment into a second vehicle would be required. It was said that "it is doubtful" whether there would be available other freight of other shippers to be loaded into such second vehicle containing the overflow of the involved commodities. It therefore was concluded that the rating of 45%, if [fol. 10] accompanied by the limitation of its availability to 30,000 pounds or more, would be unlawful because it would constitute "inefficient" transportation service at more than the lowest operating cost consistent with the furnishing of it. Plaintiff respectfully shows unto the Court that such determination is upon its face an error of law for the reason that the Commission does not possess power directly or indirectly to predicate a conclusion of illegality of a given rate and minimum weight upon a finding that inefficient tranportation service would be the result thereof. There was no finding that the partial use of a second vehicle in order to accommodate 30,000 pounds of a single shipment at the rating of 45% of first class would cause the total earnings to be unremunerative or cast an undue burden upon other traffic. The Commission lacks the power to determine which of two methods of operation with respect to competitive traffic would be the most efficient and upon that ground deprive respondent motor carrier members of the plaintiff organization of the privilege of meeting such competition because the resulting motor carrier operations would be less efficient than if they did not meet such competition. Furthermore there is no finding that inefficiency of operation would be involved if the second motor vehicle

be fully loaded either with the involved or other freight and there was no record before the Commission upon which to predicate the expression of "doubt" as to whether such additional freight would be available. The Commission lacks the authority to predicate a decision in such a case upon its mere speculations in the way of "doubt" not supported by facts of record and attributing to respondent motor carrier members of plaintiff an intentional purpose so to conduct their business as to be inefficient.

[fol. 11] XIV

Plaintiff avers that as a consequence of the order of the Commission its member motor carriers are deprived of the opportunity of competing with railroads on fair and equal terms with consequent loss of traffic and injury to their business for which there is no plain, complete and adequate remedy at law.

Wherefore it is respectfully prayed that process may issue requiring the defendants and each of them to answer this petition; that upon final hearing such order of the Commission be annulled and set aside and its enforcement enjoined; and that pending such final hearing and order of this Court, plaintiff may have an interlocutory injunction suspending or restraining the enforcement, operation or execution of such order; and that plaintiff may have such other and further relief as the facts shown and to be shown unto the Court may require, including the costs of this action.

(Signed) Charles E. Cotterill, Attorney for plaintiff. P. O. Address: 70 East 45th Street, New York, N. Y.

[fol. 12] EXHIBIT "A" TO PETITION

M-5770

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. M-1216[1]

Rugs and Matting from the East to Western Trunk Line Territory

Submitted April 10, 1941. Decided November 17, 1941

Proposed suspended reduced classification-exceptions rating on hard-surface floor covering, including carpets, carpeting, door and floor mats, laying sundries, and accessories, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska, and proposed new commodity rates from certain points in New England and trunk-line territories to certain points in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota, subject to minima of 20,000 pounds and 30,000 pounds, and proposed new and reduced commodity rates, minimum 30,000 pounds, from points in New England and trunk-line territories to certain points in Ohio, found just and reasonable and otherwise lawful, except to the extent that the minimum of 30,000 pounds exceeds a minimum of 20,000 pounds. Suspended schedules, to the extent found not just and reasonable, ordered canceled without prejudice to the publication by respondents of rates on linoleum, minimum 20,000 pounds, which are not less than 45 percent of the corresponding first-class rates. Proceedings discontinued.

J. E. Haydon, L. M. O'Leary, and Joseph H. Edwin for respondents.

James A. Gillen, Henry Christianson, W. M. Spaulding, and H. D. Boynton for protestants.

P. G. Whitmore for others.

---

[1] This report also embraces Investigation and Suspension Docket No. M-1445, Linoleum and Related Articles from the East to Ohio.

Report of the Commission

Division 3, Commissioners Mahaffie, Miller, and Johnson

By Division 3:

In Investigation and Suspension Docket No. M-1216, by schedules filed to become effective August 24, 1940, the respondent motor common carriers[2] proposed to establish on hard-surface floor covering, including carpets, carpeting, door and floor mats, and laying sundries and accessories, hereinafter called linoleum, a reduced classification-exceptions rating, minimum 20,000 pounds, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska, and new commodity rates, subject to minima of 20,000 pounds and 30,000 pounds, from 14 points of origin in trunk-line and New England territories[3] to 34 points in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. Upon protests of the western trunk-line rail carriers, operation of the proposed schedules was suspended until February 20, 1941, and subsequently the respondents postponed indefinitely the operation of the schedules. At the hearing, owing to a tariff provision which the respondents agreed to make applicable in connection with the proposed schedules, the rail carriers presented no evidence.

[fol. 13]

In Investigation and Suspension Docket No. M-1445, the respondent motor common carriers, by schedules filed to become effective January 25, 1941, proposed to establish on linoleum new and reduced commodity rates, minimum 30,000 pounds, from the points of origin named in footnote 3, Marcus Hook, Pa., and points taking the same rates, to Akron, Canton, Cleveland, Columbus, and Toledo, Ohio, and

---

[2] Parties to the tariffs filed by Eastern-Central Motor Carriers Association, Agent Everett H. Russell.

31 M. C. C.

[3] Group A, Trenton, N. J.; group B, Salem, N. J.; group C, Wilmington, Del., Camden and Paulsboro, N. J., and Eddystone and Philadelphia, Pa.; group D, Lancaster, Pa.; group E, Kearny and Somerville, N. J., and New York, N. Y.; and group F, Boston, East Walpole, and West Walpole, Mass.

31 M. C. C.

points taking the same rates. Upon protest of the New England Freight Association, the operation of the proposed schedules was suspended until August 25, 1941, and subsequently the respondents indefinitely postponed the operation of the schedules. The Roadway Express, Inc., and the Shippers' Freight Forwarding Company appeared in support of the proposed rates. Subsequent to the hearing, the rail carriers withdrew their protest.

The proceedings were heard separately but are consolidated here for our convenience. They pertain to the lawfulness of proposed truckload and volume rates on linoleum published on behalf of motor common carriers, members of the Eastern-Central Motor Carriers Association, hereinafter called the association. Rates are stated in amounts per 100 pounds.

I. and S. No. M-1216.—At the time the rates in this proceeding were suspended, the respondents maintained column 50 rates (50 percent of first class), minimum 20,000 pounds, on linoleum from the points of origin in New England and trunk-line territories shown in footnote 3 to the 34 destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. During the pendency of the proceedings, the rates on linoleum to Minnesota and South Dakota points were increased to the column 55 rates (55 percent of first class), minimum 20,000 pounds, and the classification rating was reduced to 45 percent of first class. The latter basis is not used because respondents' rate tariffs contain a rule under which articles rated lower than column 50 are subject to column 50 rates, except that articles subject to an exception rating of column 50K take column 50K rates. The [fol. 14] Keeshin Motor Express Company, hereinafter called Keeshin, maintains commodity rates on linoleum, minimum 18,000 pounds, from certain points in New England and trunk-line territories to points in western trunk-line territory which are somewhat lower than the proposed rates, minimum 20,000 pounds, and somewhat higher than the proposed rates, minimum 30,000 pounds. On August 24, 1940, the effective date of the proposed schedules, the rail carriers maintained rates from these points of origin to points in western trunk-line territory equal to 45 percent of first class, minimum 30,000 pounds. Subsequently the rail carriers established commodity rates which approximate 42.5 percent of first class, minimum 30,000 pounds, from and to many of these points.

The respondents propose to establish on linoleum classification-exceptions ratings of column 50K, 47.5 percent of first class, minimum 20,000 pounds, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska. They also propose to establish new commodity rates, minimum 20,000 pounds, from the grouped points of origin named in footnote 3 to certain points in Iowa, Kansas, Missouri, and Nebraska, which approximate column 50K, and to certain points in Minnesota and South Dakota, which approximate column 50, and rates, minimum 30,000 pounds, to the destinations in the States named which are 45 percent of first class. The proposed rates, minimum 20,000 pounds, range from 91 cents from Lancaster, Pa., to Cedar Rapids, Iowa, to $1.67 from Boston to Dodge City, Kans., 1,819 miles. The highway distance from Lancaster to Cedar Rapids is not shown, but the distance from Philadelphia to Cedar Rapids is 988 miles, and the proposed rate is 93 cents. The proposed rates, minimum 30,000 pounds, range from 86 cents from Lancaster to Cedar Rapids to $1.57 from Boston to Dodge City. The rate from Philadelphia to Cedar Rapids is 88 cents.

The record shows the highway distances, the proposed rates, and the revenue that would be derived from the proposed rates from Boston, New York, and Philadelphia to the 34 points of destination in the States named. The proposed rates, minimum 20,000 pounds, from these points to the points of destination would yield, based upon a loading of 22,000 pounds, revenue ranging from 18 cents a truck-mile under the rate of $1.12 from Boston to Chillicothe, Mo., 1,369 miles, to 24.9 cents a truck-mile under the rate of $1.27 from Philadelphia to Springfield, Mo., 1,121 miles. The proposed rates, minimum 30,000 pounds, would produce, based upon a loading of 22,000 pounds, revenue ranging from 16.9 to 23.4 cents a truck-mile under the respective rates of $1.05 and $1.19 from and to the respective points.

I. and S. No. M-1445.—The respondents maintain from the points of origin shown in footnote 3, Marcus Hook, and points taking the same rate to Akron, Canton, Cleveland, [fol. 15] Columbus, Toledo, and points taking the same rates, on linoleum, rates, minimum 20,000 pounds, based on classification-exceptions ratings of column 50K (approximately 47.5 percent of first class), except that specific commodity rates, minimum 20,000 pounds, are in effect of 56 cents from Kearny, Port Newark, and Trenton, N. J.,

Marcus Hook, and Philadelphia to Akron and Cleveland; of 50 cents from Wilmington, Del., to Akron and Cleveland; and of 60 cents from Wilmington to Toledo. The Eastern Motor Dispatch, Inc., maintains, on linoleum, rates, minimum 30,000 pounds, from and to many of the points to which the respondents have in effect column 50K, rates equal to column 45 (approximately 45 percent of first class). That carrier and the Liberty Motor Freight Lines, Inc., maintain rates, minimum 16,000 pounds, of 56 cents to Akron and Cleveland, 54 cents to Canton, and 59 cents to Columbus and Toledo, from Chester, Pa., Kearny, Marcus Hook, New York, Philadelphia, Somerville, Trenton, and Yonkers, N. Y., and rates, minimum 20,000 pounds, of 53 cents to Akron, Canton, and Cleveland, 56 cents to Columbus, and 59 cents to Toledo from Lancaster. Many of these commodity rates are less than and others are greater than the column 45 rates. Keeshin also has in effect commodity rates, minimum 16,000 pounds, from Kearny, Port Newark, and Yonkers, of 56 cents to Akron and Cleveland, and of 59 cents to Toledo, and a rate of 68 cents from Walpole to Cleveland. The rail rates, minimum 30,000 pounds, from New England and truck-line territories to the Ohio points are 45 percent of first class.

The respondents propose to establish from and to these points, except that no rates are proposed from Kearny to Akron and Cleveland, specific commodity rates, minimum 30,000 pounds, which are the same as the rail rates, and are based upon 45 percent of first class. The proposed rates range from 49 cents from Lancaster to Canton to 68 cents from Boston, East Walpole, and West Walpole to Columbus. The record shows only the highway distances from nine points of origin to the respective destinations. These nine distances vary from 333 miles from Lancaster to Canton to 772 miles from Boston to Columbus. Based upon a loading of 22,000 pounds, the customary truckload, the proposed rates would yield revenues ranging from 32.4 cents to 19.4 cents a truck-mile. Computations also were made showing the revenue that would be obtained from the proposed rates on the basis of loadings of 23,000 pounds and 24,000 pounds.

The proposed rates to Ohio points are subject to a rule which provides that they would apply only on shipments of linoleum, minimum 30,000 pounds, which are received at

and transported from the point of origin, from one shipper, in one day, and on one bill of lading. The proposed rates to the 34 destinations in Iowa, Kansas, Minnesota, Missouri, [fol. 16] Nebraska, and South Dakota are not subject to such a rule, but the respondents and the rail carriers agreed that a similar provision should be made applicable in connection with them.

As stated, specific-commodity rates, minimum 20,000 pounds, and minimum 30,000 pounds, are proposed to certain points in western trunk-line territory. The rates would apply in the alternative. Thus a shipper having a shipment weighing 20,000 pounds or more would be accorded a truckload rate.

The respondents do not propose to establish commodity rates, minimum 20,000 pounds, to the Ohio points. They maintain commodity rates, minimum 20,000 pounds, from Port Newark, Trenton, Marcus Hook, and Philadelphia to Akron and Cleveland, and from Wilmington to Akron, Cleveland, and Toledo. Of these only the rates from Trenton, Marcus Hook, and Philadelphia are higher than the proposed rates, minimum 30,000 pounds. If the latter became effective they would apply in the alternative with the commodity rates, minimum 20,000 pounds, from the three points named. The proposed rate from Port Newark (this point takes the New York rate) to Akron and Cleveland is 58 cents, minimum 30,000 pounds, and, as stated, the present commodity rates, minimum 20,000 pounds, from Port Newark to these points are 56 cents. The proposed rates, minimum 30,000 pounds, from Wilmington to Akron and Cleveland, are 53 cents, and that from Wilmington to Toledo is 61 cents, but, as stated, the present commodity rates, minimum 20,000 pounds, from and to these points, are 50 and 60 cents respectively. Therefore, if the proposed rates were approved they would not be the applicable rates from and to these points, for the reason that the lower commodity rates, minimum 20,000 pounds, would apply on truckload shipments of linoleum.

Respondent Brady Transfer & Storage Company, of Fort Dodge, Iowa, hereinafter called Brady Transfer, transports linoleum from points in New England to points in western truck-line territory and Ohio. It operates equipment, some of which has a loading capacity of from 22,000 pounds to 25,000 pounds of linoleum. During 1940 its total cost of operation, including terminal expense and the expense of

pick-up and delivery service, on all traffic, both truckload and less than truckload, transported by it, approximated 17.55 cents a truck-mile. Linoleum when shipped in truckloads is handled from point of origin to point of destination direct and does not require so-called terminal service. The average terminal expense on all traffic of the Brady Transfer for 1940 was estimated to approximate 3.07 cents a truck-mile. Only a minor portion of this expense, such as the cost of billing and of the dispatcher, who receives the order for the shipment, would be allocable to the transportation of [fol. 17] linoleum in truckloads. Based upon these costs, the proposed rates are contended to be reasonably compensatory.

This respondent compared the proposed rates, minimum 20,000 pounds and minimum 30,000 pounds, from Boston, New York, and Philadelphia to points in western trunk-line territory with the rates on dairy products, minimum 20,000 pounds, in the reverse direction. In 1940, dairy products comprised approximately 92 percent of the traffic transported by Brady Transfer from points in western trunk-line territory to the Atlantic seaboard. In only four instances do the rate on dairy products exceed the proposed rates, minimum 20,000 pounds, and in numerous instances they are the same as or lower than the proposed rates, minimum 30,000 pounds, and the remainder of the compared rates fall between the higher and lower bases of rates proposed. Dairy products move under refrigeration, and are more costly to transport than linoleum. The respondents maintain from Boston to certain points in western trunk-line territory, some of which are points of destination herein, rates on fresh frozen fish, minimum 20,000 pounds, including refrigeration, based upon classification exceptions ratings of 50 percent of first class, and lower commodity rates, minimum 22,000 pounds, not including the cost of ice. Brady Transfer transported approximately 1,000 truckloads of fish during 1940 from Boston to points in western trunk-line territory.

Respondent Yankee Lines, Inc., hereinafter called Yankee Lines, of Akron, hauls linoleum from certain origins in trunk-line territory to points in Ohio. It has equipment capable of transporting loads ranging from 9,600 to 25,500 pounds, but the greater portion of its equipment has a payload capacity in excess of 20,000 pounds. This carrier's experience has indicated that the cost of operation of units

of equipment capable of transporting pay loads of from 9,600 pounds to 16,000 pounds varies from 9 cents to 17 cents a truck-mile, and that the cost of operating equipment capable of hauling pay loads of from 20,000 to 25,500 pounds varies from 20.3 to 24.7 cents a truck-mile. The record does not contain the data from which these costs were determined. It does, however, show that the average cost of operation incurred by the Yankee Lines on all traffic, both truckload and less-than-truckload, during 1940 was 21.1 cents a truck-mile.

Yankee Lines compared the proposed rates with motor common carrier rates on numerous commodities. The only rates referred to having minima in excess of 23,000 pounds are rates of 51 cents, minimum 30,000 pounds, on drugs and medicines, and of 61 cents, minimum 40,000 pounds, on liquor, from Hartford, Conn., to Cleveland, a highway distance of 571 miles. This respondent maintains rates on liquor, minimum 45,000 pounds, based upon 44 percent of [fol. 18] first class. It is contended by this respondent that these comparisons demonstrate that the proposed rates would be just and reasonable.

The record establishes that rates based upon 45 percent of first class from points of origin in New England and trunk-line territories to points in western trunk-line territory and Ohio are just and reasonable provided the minimum that is applicable in connection therewith is reasonable. Let us, therefore, examine the reasons advanced by the respondents in support of the proposed minimum of 30,000 pounds.

Yankee Lines originally requested the standing rate committee of the association to publish rates on linoleum from the points in trunk-line territory served by it to the five points in Ohio on a basis of 45 percent of first class, minimum 22,000 pounds, in order to enable it to meet the competition of the railroads and of the Eastern Motor Dispatch, Inc. Since other members of the association were interested in similar rates, and since apparently the desire was to publish rates identical with those of the rail carriers, the standing rate committee of the association obtained permission from the Yankee Lines to increase its proposed minimum from 22,000 pounds to 30,000 pounds, and filed on behalf of the Yankee Lines and the other respondents the proposed rates, minimum 30,000 pounds, to the Ohio destinations. The linoleum shipments which move by rail

to the Ohio points generally are consigned to warehouses having rail sidings. Linoleum is tendered for shipment to the respondents in quantities weighing from 18,000 pounds upward. The Yankee Lines received on one bill of lading one shipment which weighed 134,000 pounds. The record does not show the weight of the average shipment. It shows clearly, however, that it is physically impossible to load 30,000 pounds of linoleum into a single unit of equipment operated by the respondents. While some equipment is capable of transporting 25,000 pounds, the normal truckload of linoleum approximates 22,000 pounds, and, as seen above, the respondents used this loading in each proceeding to obtain the revenue which would be derived from the proposed rates. It also will be noted that the respondents and competing motor common carriers maintain commodity rates on linoleum subject to minimum weights of 16,000 pounds, 18,000 pounds, and 20,000 pounds.

In justification of the proposed minimum of 30,000 pounds, the respondents rely upon *Carpets and Carpeting, Official to Southern Territory*, 237 I. C. C. 651. In that proceeding the Commission had under consideration, among other things, the lawfulness of proposed motor common carrier rates on linoleum from official to southern territory. Certain motor common carriers proposed therein to retain the [fol. 19] column 50 rating, minimum 15,000 pounds, and to establish certain rates, subject to a minimum of 30,000 pounds, the latter rates, which are the same as or generally 1 cent higher than the column 45 rail or rail-water rates, to alternate with the then present column 50 basis. With respect to these proposals the Commission at pages 657-658 said:

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

And the Commission at page 658 found—

that the postponed schedules of the motor-carrier respondents have not been shown to be unreasonable or otherwise unlawful except to the extent (*a*) that they propose to retain a minimum of less than 20,000 pounds, (*b*) that they provide rates subject to a minimum of 30,000 pounds which are lower than the corresponding proposed carload rates for application jointly by railroad and water carriers hereinabove found not shown to be unreasonable or otherwise unlawful, and (*c*) that a rule is not provided in connection with the column 45 basis to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

In *Peanut Butter from Montgomery, Ala., to Georgia*, 22 M. C. C. 375, division 2, in discussing the question of minimum weights, at pages 377-378 said:

Motor carriers should not maintain truckload or volume rates subject to minimum weights greater than they are able to transport in the equipment which they generally have available. There are numerous motor-carrier rates subject to volume minimum weights which exceed the amount which can be transported in the trucks generally used for the transportation of the commodities on which these rates apply. The national motor-freight classification is replete with ratings subject to minimum weights of 40,000, 50,000, and 60,000 pounds. In most States, restrictive laws prevent the transportation by motor carriers of loads as heavy as 20 to 30 tons in single units of equipment. We have not condemned the minimum weights of motor carriers which can only be transported in more than one vehicle. Yet we believe that all rates subject to a minimum weight should be restricted to apply only when the shipments which equal or exceed the minimum weight are actually tendered to the carrier for transportation from one shipper and are transported from the point of origin in 1 day and on one bill of lading, subject, of course, to any tariff provisions allowing split pick-ups or partial loading in transit. This view is in consonance with *Carpets and Carpeting from Official to Southern Territory*, 237 I. C. C. 651.

[fol. 20] The Commission has found repeatedly that carload minimum weights should be established by rail carriers

with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527. *Coal, Wyoming to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

Findings.—We find that the proposed schedules in these proceedings are just and reasonable and otherwise lawful except to the extent that they propose to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds is unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable.

The proposed schedules, to the extent found not just and reasonable, will be ordered canceled without prejudice to the establishment by respondents of truckload rates on linoleum, minimum 20,000 pounds, which are not less than 45 percent of the corresponding first-class rates.

An appropriate order will be entered.

[fol. 21] ORDER

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office in Washington, D. C., on the 17th Day of November, A. D. 1941

Investigation and Suspension Docket No. M-1216

Rugs and Matting, East to Western Trunk Line Territory

Investigation and Suspension Docket No. M-1445

Linoleum and Related Articles, East to Ohio

It appearing, That by orders dated August 23, 1940, in Investigation and Suspension Docket No. M-1216 and January 24, 1941, in Investigation and Suspension Docket No. M-1445, the Commission entered upon hearings concerning the lawfulness of rates, charges, regulations, and practices stated in the schedules described in said orders, and suspended the operation of said schedules until February 20, 1941 and August 25, 1941, respectively, and subsequently the respondents voluntarily postponed the operation of the said schedules indefinitely;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made and that said division on the date hereof has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents in Investigation and Suspension Dockets Nos. M-1216 and M-1445 be, and they are hereby, notified and required to cancel the said schedules to the extent found unjust and unreasonable, on or before December 24, 1941, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act, and that said proceedings be discontinued.

By the Commission, division 3.

W. P. Bartel, Secretary. (Seal.)

[fol. 22] EXHIBIT "B" TO PETITION

Interstate Commerce Commission

Investigation and Suspension Docket No. M-1216

Rugs and Matting from the East to Western Trunk Line Territory

Submitted May 28, 1942. Decided August 11, 1942

1. Upon oral argument, finding in the prior report, 31 M. C. C. 193, that proposed rates, minimum 30,000 pounds, on hard-surface floor covering from certain points in New England and trunk-line territories to certain destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota were unjust and unreasonable, affirmed.

2. Further found that maintenance on the same traffic of lower rates, minimum 30,000 pounds, than rates, minimum 20,000 pounds, would be unjustly discriminatory.

Additional appearances:

Charles E. Cotterill, Edgar Watkins, Jr., J. Ninian Beall, F. C. Hefferren, W. G. Clayton, Jr., O. L. Merchant, Leo E. Golden, and *Dabney T. Waring* for respondents and motor carrier publishing agents, interveners.

John S. Burchmore, John T. Money, Charles J. Fagg, E. G. Siedle, Nuel D. Belnap, Luther M. Walter, and *W. H. Ott* for others.

Report of the Commission Upon Oral Argument

By the COMMISSION:

In this proceeding, the respondents proposed to establish on hard-surface floor covering, including carpets, carpeting, door and floor mats, laying sundries, and accessories, hereinafter called linoleum, a reduced classification-exception rating, minimum 20,000 pounds, from points in New England and trunk-line territories to points in Iowa, Kansas, Missouri, and Nebraska, and new commodity rates subject to minima of 20,000 and 30,000 pounds, from 14 points of origin in trunk-line and New England territories to 24

destinations in Iowa, Kansas, Minnesota, Missouri, Nebraska, and South Dakota. The rates under the proposed classification-exception rating, minimum 20,000 pounds and the proposed commodity rates, minimum 20,000 pounds, were the equivalent of approximately 47.5 percent of the first-class rates, and the proposed commodity rates, minimum 30,000 pounds, were approximately 45 percent of the first-class rates.

[fol. 23] Upon protests of the western trunk-line rail carriers, operation of the proposed schedules was suspended until February 20, 1941, and subsequently the operation of the schedules was postponed indefinitely by the respondents. At the hearing the rail carriers, the only protestants, withdrew from the proceeding after the respondents had agreed to make applicable in connection with the proposed commodity rates, minimum 30,000 pounds, a tariff provision reading: "Shipments on which freight charges are based on a weight of not less than 30,000 pounds must be received at and transported from the point of origin from one shipper in one day and on one bill of lading."

In its prior report herein, 31 M. C. C. 193, division 3 did not find that the level of the rates, that is, 45 percent of first class and 47.5 percent of first class, was unjust or unreasonable, but, in effect, found that either basis of rates subject to a minimum of 30,000 pounds was unjust and unreasonable. The proposed schedules to the extent found not just and reasonable were ordered canceled without prejudice to the establishment by respondents of truckload rates, minimum 20,000 pounds, which were not less than 45 percent of the corresponding first-class rates.

At the oral argument counsel for respondents stated that respondents had not established rates on linoleum equal to 45 percent of first class, minimum 20,000 pounds. A check of the tariffs discloses that from the points of origin herein involved to points in Iowa, Kansas, Missouri, and Nebraska the present rates are column 50-K, minimum 20,000 pounds, 47.5 percent of first class, but to points in Minnesota and South Dakota the rates are 45 percent of first class, minimum 20,000 pounds. As stated in the prior report the corresponding rail rates were reduced from 45 percent of first class, minimum 30,000 pounds, to 42.5 percent thereof, minimum 30,000 pounds. Prior to finding the proposed

rates, minimum 30,000 pounds, unjust and unreasonable, division 3 said:

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight [fol. 24] at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527. *Coal, Wyoming to Idaho Falls, Lincoln, and Shelley, Idaho*, 29 M. C. C. 335. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

The respondents and the intervening motor carrier publishing agents, hereinafter referred to collectively as the motor carriers, contend that the views of division 3 are at variance with our views in *Carpets and Carpeting, Official & Southern Territory*, 237 I. C. C. 651, and that the finding of division 3 herein should be reversed. On oral argument counsel for the motor carriers stated, "We rest our case on a proposition of law essentially which is that motor carriers, when lawfully meeting a subnormal railroad rate, may at-

tach to their rate the same incidents as are attached to the railroad rate in the matter of the minimum weight requirement." On brief under the heading "The Ultimate Question Presented" it is stated, "Motor carriers may distinguish between small loads and larger lot shipments in their rates. The resulting inequality of charge per 100 pounds as between shippers is not inherently unlawful. May not the lowest of such motor carrier rates, when dictated by competitive necessity, be governed by minimum weight corresponding to the established trade unit of shipment by railroad facilities as reflected in the competitive railroad carload rate even if, for any reason, accommodation of that minimum quantity by motor vehicle calls for an overflow or follow-lot regardless of a relative unit operating cost on the overflow compared with a single full load? The question assumed proper policing rules to avoid abuse."

In *Carpets and Carpeting, Official to Southern Territory, supra,* relied upon by the motor carriers, we had under consideration, among other things, the lawfulness of proposed motor common carrier rates on linoleum from official to southern territory. Certain motor common carriers proposed therein to retain a column 50 rating, minimum 15,000 pounds, and to establish certain rates, minimum 30,000 pounds, the same as or generally 1 cent higher than the column 45 rail or rail-water rates. At pages 657 and 658, we said:

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

[fol. 25] With respect to the truckload rates proposed in the proceeding cited, we found:

that the postponed schedules of the motor-carrier respondents have not been shown to be unreasonable or otherwise unlawful except to the extent (a) that they propose to retain a minimum of less than 20,000 pounds, (b) that they provide rates subject to a minimum of 30,000 pounds which are lower than the corresponding proposed carload rates for application jointly by railroad and water carriers hereinabove found not shown to be unreasonable or otherwise unlawful, and (c) that a rule is not provided in connection with the column 45 basis to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

On brief the motor carriers refer to many of our former reports wherein railroad rates based upon minimum weights in excess of the loading capacity of cars have been found unreasonable. They contend that, for the most part, such findings were necessary because shippers under the tariff provisions have been required, when the prescribed minimum weight exceeded the quantity capable of being loaded in a single freight car, to pay either the less-than-carload rate on that portion of the shipment loaded in the second car or the carload rate on the minimum weight on the second car, irrespective of the weight of the portion of the shipment transported therein. Therefore, the shipper suffered financial injury. They assert that such cases are not in point because the shipper by motor vehicle pays charges based upon the rate and the actual weight of shipment, provided that weight exceeds or equals the minimum weight, and that, since the shipper does not suffer financial injury, he has no interest in whether one or more vehicles are used to transport the shipment.

The motor carriers also refer to former reports wherein we have declined to give our approval to trainload or multiple-car rates, because to do so would unduly prefer the large shipper to the prejudice of the small shipper. Many of these reports are discussed in *Molasses from New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 485, hereinafter called the *Molasses case*. In that proceeding the then carload rate on blackstrap molasses in tank cars from New Orleans and Harvey, La., to Peoria and Pekin, Ill., was 17.5 cents and the rail carriers proposed to establish

a rate of 14 cents, minimum 1,800 tons, equivalent to 38.5 tank carloads, to meet the competition of cargo movements by private barge. The railroads established that their operating costs per 100 pounds would be less, when a single consignment of approximately 38 tank carloads of molasses was transported at one time in a single train, than when the commodity was transported in a single carload. However, the proposed rate was not a trainload rate but a quantity or multiple-car rate. We found therein, at page 502:

> [fol. 26] We find that there is nothing unlawful in the establishment of railroad rates on a quantity larger than a carload, when moving as a single shipment, where, as here, they are designed to meet competition from other modes of transport whose unit of transportation is not limited to single carloads, provided a just and reasonable relation in rates as between the larger and smaller quantities of the same traffic is maintained. We further find that the proposed reduction in rates in this instance for quantity movements is greater than necessary to meet the competition confronting the respondents; that the reduced rate is unreasonable low and does not bear a just and reasonable relation to the existing carload rate on the same traffic between the same points; and that it is, therefore, unlawful.
>
> An order will be entered requiring the cancelation of the schedules under suspension without prejudice to the establishment of a quantity or multiple-car rate on the traffic in question no lower than 15 cents, subject to a minimum of 1,800 tons to be shipped under one bill of lading from one consignor to one consignee at one time, which we find to be a reasonable minimum rate.

It is contended by the motor carriers that in the *Molasses case* we found, in effect, that trainload or multiple-car rates, which were lower than reasonable carload rates on the same traffic and which under our prior reports would have been found unduly preferential, were preferential, but not unduly so, as the result of the presence of competition. They also maintain that the finding therein was based solely upon the presence of the element of competition and that the fact that it was shown that the cost per 100 pounds

which would be incurred in handling a single shipment of molasses in quantities of 1,800 tons, would be less than the cost incurred in handling a carload shipment was not a material factor in the decision and was of no legal importance. The record herein does not show the costs incurred in handling 30,000 pounds or 20,000 pounds of linoleum, and, under the theory of the motor carriers, if competition exists between the rail and motor carriers, such costs are immaterial.

On linoleum the proposed rates, minimum 20,000 pounds are the equivalent of column 47.5 rates and the proposed rates, minimum 30,000 pounds, approximate column 45 rates. The rail carriers, when the proposed schedules were filed, maintained rates based upon column 45, minimum 30,000 pounds. The motor carriers assert that they are entitled to enter into competition with the rail carriers, and that the only way this can be done is to establish the identical rail carload rate and minimum weight. They say that if the same rate is established, subject to a lower minimum, the motor carriers would be indulging in a destructive competitive practice, which would cause the railroads in turn to reduce their carload rate to meet the truck rate and lower minimum weight, and that the result would be that a competitive equilibrium would never be achieved. [fol. 27] The National Industrial Traffic League maintains that the findings of Division 3 are sound and should be affirmed, and that the policy announced by division 3, set forth in the foregoing quotation from its report, is in keeping with the rule of rate making in section 216(i) of the Interstate Commerce Act. The National Industrial Traffic League contends that we should adopt this policy as our own.

At the oral argument, a representative of all of the manufacturers of linoleum in the United States, except two, questioned the propriety of volume rates subject to minimum weights in excess of the quantity which can be loaded into a truck. The linoleum manufacturers also contend that rates made on such a basis are unsound and request that we affirm the findings of division 3.

The interpretation placed upon our findings in the *Molasses case* by the motor carriers is erroneous. In that proceeding, we authorized the establishment of a multiple-car rate, minimum 1,800 tons, on molasses which was lower than the then carload rate of 17.5 cents. We thus accorded

a lower rate to a number of carloads tendered as a single shipment. This was a departure from our prior findings that the maintenance of a trainload rate lower than a carload rate was unlawful because it was unjustly discriminatory. Our finding in the *Molasses case* was not based solely on the existence of water competition, but also upon a showing that the circumstances and conditions surrounding the transportation of multiple-car shipments of molasses differ materially from those encountered in the transportation of a single carload of molasses, with the result that there existed a material difference in the costs of service per 100 pounds. Such differences in transportation conditions and costs in our opinion prevented the discrimination caused by the lower multiple-car rate when compared with the carload rate from being unjust discrimination and, therefore, the multiple-car rate approved by us was lawful.

This interpretation of our findings in the *Molasses case* is in consonance with the interpretation placed upon those findings in *Petroleum Rail Shippers' Assn.* v. *Alton and S. R.*, 243 I. C. C. 589. In the latter proceeding after giving consideration to the question of authorizing multiple-car rates on petroleum, we found among other things, that the record failed to establish that there was a substantial difference between the costs per 100 pounds in transporting a multiple-car shipment and a single carload. We also found that there was insufficient evidence concerning the advantages and disadvantages of multiple-car transportation as compared with single-car transportation to justify affirmative findings as to whether or not multiple-car rates on petroleum lower than those applicable to single carloads would be lawful.

Under section 216(i) of the act, we are required, in determining the lawfulness of motor common carrier rates, to give due consideration, among other factors, "to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service." Under the [fol. 28] rates proposed by the respondents, a shipper of 20,000 pounds of linoleum from Boston, Mass., to Dodge City, Kans., 1,819 miles, would be required to pay a rate of $1.67 which would return to the carrier a revenue of 18.4 cents a truck-mile. A shipper of 30,000 pounds would pay a rate of $1.57. If 20,000 pounds of the shipment at

the rate of $1.57 were to move in one truck, and a second truck were to be used for the transportation of the remaining 10,000 pounds, the carrier would receive revenues per truck-mile of 17.3 cents on the first truck and 8.6 cents on the second truck. If the 30,000-pound shipment were to be transported in two trucks, and 22,000 pounds were to be loaded in the first and 8,000 pounds in the second, the revenues per truck-mile to the carrier under the rate of $1.57 would be 19 cents for the first truck and 6.9 cents for the second. In both of the examples given, the carrier would have space available in the second truck in which less-than-truckload shipments could be transported, but it is doubtful whether less-than-truckload shipments from Boston to Dodge City or between intermediate points always would be available.

The rates and carload minimum weights of rail carriers are fixed with relation to conditions surrounding transportation in rail service. The primary factors considered in fixing carload minimum weights are the loading characteristics of the commodities moving in carload quantities and the necessity for insuring an efficient use of the carriers' equipment. Except in unusual circumstances, such as those presented in the *Molasses case*, minima in excess of the weight which can be loaded in a single car have been condemned.

In fixing motor carrier rates lower than those for application on less-than-truckload shipments, the shipper must be required to tender to the motor carrier a specified minimum weight before the shipment is entitled to the lower rate.

With respect to linoleum, the minimum truckload weight established by the motor carriers between the points herein is 20,000 pounds. This truckload minimum weight was determined upon a consideration of the loading characteristics of the commodity and the size of truck ordinarily used in its transportation. Although 22,000 pounds can be loaded in respondents' trucks, the minimum of 20,000 pounds is not to be condemned because some reasonable leeway may be allowed between the truckload minimum weight and the maximum carrying capacity of the truck. This maximum carrying capacity is the amount which can be carried under the laws of the States through which the trucks move.

Under the respondents' proposal, a shipper tendering 20,000 pounds would pay a rate 47.5 percent of first class. If, however, another shipper were to tender 30,000 pounds, the respondents would accord it a rate 45 percent of first class, not because the cost of transporting 30,000 pounds is less than the cost of transporting 20,000 pounds, but because the motor carriers seek to establish rates subject to the same minimum as the rail carriers maintain in connection with their carload rates. The motor carriers contend that rates 47.5 percent of first class and rates 45 percent of first class are reasonable rates. If rates 45 percent of first class are reasonable on any shipments exceeding [fol. 29] a truckload, they are reasonable for all truckload shipments unless, as in the *Molasses case*, the cost of transporting quantities exceeding a truckload is less than that of transporting a truckload. In the absence of such a showing of dissimilar circumstances and conditions, the rates 45 percent of first class should not be accorded to one class of shippers, those which tender 30,000 pounds at a time, and denied to another class of shippers, those tendering 20,000 pounds at a time.

The motor carriers contend that the existence of the competition of the rail carriers which maintain rates 42.5 percent of first class, minimum 30,000 pounds, constitutes a dissimilarity in circumstances and conditions sufficient to prevent us from finding that unjust discrimination results from the maintenance of lower rates on 30,000-pound than on 20,000-pound shipments. The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, the United States Supreme Court held that the innocent character of a discrimination is not established, as a matter of law, by showing that the preferential rate is given to others to develop traffic on the carrier's own lines or to secure competitive traffic. The Court further held that these are factors to be considered by the Commission; but they do not preclude a finding that the discrimination practiced is unjust.

The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does

not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination.

We are mindful of the fact that we approved certain rates subject to a minimum weight of 30,000 pounds on linoleum in *Carpets and Carpeting, Official to Southern Territory, supra.* However, our report therein expresses our doubt as to the propriety of establishing a minimum of 30,000 pounds in connection with the proposed column 45 basis because it would require more than one unit of equipment to transport 30,000 pounds. That report was issued over a year ago and now we are convinced that not only were our doubts as expressed therein well founded, but that for the future we shall follow the policy announced in the prior report herein with respect to minimum weights in excess of the loading capacity of the equipment customarily used by the motor carriers.

Upon oral argument, we find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots. We further find that the proposed rates would be unreasonable to the extent they exceed rates 45 percent of the first-class rates from and to the same points subject to a minimum of 20,000 pounds. Respondents should establish rates 45 percent of first class, minimum—

[fols. 30-31] With respect to the question of reasonableness, division 3 found that rates 45 percent of first class, minimum 20,000 pounds, were not unreasonably low. This record does not establish that rates 47.5 percent of first class, minimum 20,000 pounds, would exceed a maximum reasonable basis. Both bases of rates, 45 and 47.5 percent of first class, are within the zone of reasonableness.

Upon oral argument, we affirm the prior findings of division 3 that the proposed rates 45 and 47.5 percent of first class are not unjust or unreasonable except to the extent that the proposed rates, 45 percent of first class, are subject to a minimum of 30,000 pounds.

We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots.

As previously indicated, a check of the tariffs discloses that respondents' present rates are either 45 percent of first class, minimum 20,000 pounds, or 47.5 percent of first

class, minimum 20,000 pounds. As respondent's present bases of rates do not appear to be unjust, unreasonable, or unjustly discriminatory, no order for the future is necessary.

LEE, *Commissioner*, dissenting in part:

This proceeding was reopened by the Commission on its own motion to afford all interested parties an opportunity to present oral argument on the question of the soundness of the "policy" announced by division 3 in the prior report with respect to minimum weights which may be established by motor carriers. I do not approve the adoption of that policy. In my opinion, under the act, the determination by us of whether a motor-carrier rate, or the minimum to which it is subject, is unreasonable or unjustly discriminatory must be based, not upon the application of an arbitrary policy, but upon careful consideration of all the circumstances and conditions shown to affect the transportation by motor carriers of the particular commodity or commodities on which such rate and minimum weight would apply.

I concur in the finding that both bases of rates, 45 and 47.5 percent of first class, are within the zone of reasonableness. The tariff provision which respondents agreed to make applicable in connection with the proposed commodity rates, minimum 30,000 pounds, removed protestants' objections thereto. It would effectively prevent favoritism in the application of these rates.

Commissioners ROGERS and ALLDREDGE dissent.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 22] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA

Now comes the United States of America, defendant in the above entitled case, and in answer to the petition therein says:

1. Admits the allegations of paragraphs I and II of the petition;

2. Admits the allegations of paragraph III. For further answer thereto, it alleges that the motor carrier rates involved in this case were considered by Division 3 of the Interstate Commerce Commission jointly with certain other similar motor carrier rates in proceedings entitled *Rugs and Matting from the East to Western Trunk Line Territory* (Investigation and Suspension Dockets No. M-1216 and No. M-1445) (plaintiff's exhibit A); that in such proceedings Division 3 found those rates to be unreasonable only to the extent that their application was subject to the existence of a minimum weight of 30,000 pounds rather than 20,000 pounds; that the full Commission in its decision of August 11, 1942 (plaintiff's exhibit B) considered only those rates which were involved before Division 3 as Docket No. M-1216 and did not consider the rates involved before [fol. 33] Division 3 under Docket No. M-1445; that the full Commission affirmed the prior findings of Division 3 that the proposed rates were unreasonable only to the extent that they were subject to a minimum of 30,000 pounds and further found that the proposed rates to the extent that they were subject to the minimum of 30,000 pounds would give an unjust advantage to shippers of 30,000 pound lots and would be unjustly discriminatory to shippers of 20,000 pound lots.

3. Admits the allegations of paragraph IV of the petition except that it alleges that in the official report finally adopted by the full Commission the last paragraph upon sheet 8 as set forth in plaintiff's exhibit B beginning, "Upon oral argument we find * * *" was deleted. Plaintiff's exhibit B must, therefore, be considered as having been thus modified.

4. Admits the allegations of paragraph V of the petition and for a more complete statement of the matters contained therein refers the court to the reports of the Commission (plaintiff's exhibits A and B).

5. Admits the allegations of paragraph VI of the petition except that it alleges that in the second line thereof the order of Division 3 is incorrectly stated as having been issued on November 17, 1942, whereas it was in fact issued on November 17, 1941.

6. Denies the allegations of paragraph VII of the petition except as they are consistent with the statements made in the reports of the Commission herein, and particularly denies that the decision of the Commission as to unjust advantage and unjust discrimination as between shippers is, as a matter of law, erroneous on its face.

7. Admits the allegations of Paragraph VIII, but alleges for further answer to said paragraph that the report of the full Commission (plaintiff's exhibit B, sheet 6) states that, "At the oral argument, a representative of all of the [fols. 34-35] manufacturers of linoleum in the United States, except two, questioned the propriety of volume rates subject to minimum weights in excess of the quantity which can be loaded into a truck. The linoleum manufacturers also contend that rates made on such a basis are unsound, and request we affirm the findings of Division 3."

8. Denies the allegations of paragraphs IX through XIII of the petition except as they are consistent with the statements made by the Commission in its two reports (plaintiff's exhibits A and B) and particularly denies the several allegations in said paragraphs that the Commission acted illegally and in excess of its power.

9. Denies the allegations of paragraph XIV of the petition.

Wherefore, it is respectfully prayed that the petition be dismissed.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

Thurman Arnold, Assistant Attorney General.

I hereby certify that a copy of the foregoing answer was this day mailed to each of the following persons:

Charles E. Cotterill, Esq., 70 E. Forty-fifth Street, New York, New York.

Nelson Thomas, Esq., Interstate Commerce Commission, Washington, D. C.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

October 23, 1942.

[fol. 36] In District Court of the United States for the Southern District of New York

[Title omitted]

Answer of Interstate Commerce Commission—Filed October 26, 1942

Comes now the Interstate Commerce Commission (hereinafter called the Commission), one of the defendants herein, and for its answer to the complaint filed in the above-entitled proceeding respectfully shows:

1. For the purposes of this suit the Commission admits that the allegations of paragraphs I, II, III, IV, V and VI of the complaint are true, except that the Commission denies that the copy of the report of the Commission dated August 11, 1942, Exhibit B to the complaint, is a true or correct copy of the said report as entered by the Commission, in that the last paragraph on sheet 8 of said Exhibit B does not appear in the report as entered by the Commission; (a certified copy of the report as entered is attached hereto as Exhibit No. 1 to this answer); and except that the Commission also denies that said report, Exhibit No. 1 to this answer, was predicated upon new and different findings [fol. 37] from the report and order of November 17, 1941, by Division 3, as alleged in paragraph III of the complaint, and the Commission alleges and shows that the full Commission in its report adopted and affirmed the order of Division 3 for the reasons stated in the Division 3 report and also upon additional findings and conclusions of unjust advantage and unjust discrimination, as set out in said Exhibit No. 1 hereto. That for full and complete information as

to the findings and conclusions of the Commission in both of said reports, the Court is respectfully referred to the said reports, Exhibit A to the complaint and Exhibit No. 1 to the Commission's answer herein.

2. Answering paragraphs VII, VIII, IX, X, XI, XII and XIII of the complaint, the Commission alleges and shows that said paragraphs are, and each of them is, argumentative; that the statements as to the findings and contents of the Commission's reports do not amount to a full, true or correct statement of the contents of said reports and order, for which this defendant respectfully refers the Court to the full text of the same, Exhibit A to the complaint and Exhibit No. 1 to this answer, and the Commission denies the allegations of said paragraphs as to the alleged errors, insufficiencies and deficiencies of the said reports and order.

3. Further answering the allegations of the complaint, the Commission alleges and shows that the tariff schedules effective August 24, 1940, referred to in paragraph III and elsewhere in the complaint, were, upon protests of divers parties, made the subject of an investigation and suspension proceeding before the Commission, pursuant to paragraph (g) of section 216 of Part II of the Interstate Commerce Act, designated "I. & S. Docket No. M-1216, *Rugs and Mattings from the East to Western Trunk Line Territory.*" [fol. 38] The proceeding relative to the other tariff schedules which prescribed rates to be effective January 25, 1941, also referred to in paragraph III and elsewhere in the complaint, was designated "I. & S. Docket No. M-1445, *Linoleum and Related Articles from the East to Ohio.*" All the schedules involved in both proceedings prescribed for hard-surfaced floor coverings, commonly called linoleum, rates amounting to 70 percent of first-class rates between particular points of origin and destination for shipments under 20,000 pounds, 47½ percent of first-class rates for shipments between 20,000 and 30,000 pounds, and 45 percent of first-class rates for shipments of 30,000 pounds and over; that on March 21, 1941, hearings were held in both proceedings at Columbus, Ohio, at which evidence was taken and submitted to Division 3 of the Commission; thereupon, on November 17, 1941, upon all of said evidence, Division 3 disposed of both proceedings in a single report and order,

a copy whereof is attached to the complaint herein as Exhibit A; that in said report the Commission, by its Division 3, held that the proposed rates of 45, 47.5 and 70 percent of first-class rates were just and reasonable, except as to the 30,000-pound minimum, in which respect they were found to be unreasonable to the extent that it exceeded 20,000 pounds; that thereupon, upon petition of plaintiff herein, the Commission ordered a reconsideration as to the proceeding designated I. & S. Docket No. M-1216 by its entire membership, and the questions involved were fully briefed and argued before it on May 28, 1942; that the Commission on August 11, 1942, made its report (Exhibit No. 1 to this answer) in which it affirmed the findings of Division 3 and found further that the proposed 30,000-pound minimum for the 45 percent rate would be unjustly advantageous to shippers of 30,000-pound lots and unduly discriminatory and prejudicial to shippers of 20,000-pound lots, thus [fol. 39] affirming the order of Division 3 cancelling the said schedules as to the 30,000-pound minimum upon the grounds not only of unreasonableness, but also of unlawful preference and prejudice.

The Commission further alleges and shows that in the proceedings in which the Commission's reports and order were made and entered, the parties thereto, including the plaintiff herein, were, and each of them was, accorded the full hearings provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said reports and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of the plaintiff by its counsel; that in briefs filed in said proceedings and in oral argument, questions relating to said matters were fully argued and submitted to the Commission for determination, including questions raised by the plaintiff in this suit; that thereupon the Commission determined said matters and entered and served upon the plaintiff and other interested parties in the proceeding its reports and order; that said reports and order included the Commission's findings of fact, conclusions and requirements in both proceedings aforesaid, and that upon the evidence aforesaid the Commission made the findings and

stated the conclusions upon which said order and the affirmance thereof by the full Commission are based.

The Commission further alleges that the findings and conclusions in said reports support the order here in question and that said findings and conclusions were and are, and that each of them was and is, fully supported and justified by the evidence adduced in said proceeding.

[fol. 40] The Commission further alleges that in making and affirming said order, it considered and weighed carefully each fact, circumstance and condition disclosed by the evidence presented to it by the parties to the proceeding and their respective counsel, including matters covered by the allegations of the complaint herein.

The Commission further alleges that said order was not made or entered by it either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support and warrant it and the findings upon which it was based; that in making said order the Commission did not exceed its authority, and the Commission denies each of and all the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the complaint in so far as they conflict with the allegations herein or with the statements, findings, determinations or conclusions stated in the Commission's reports attached to the complaint as Exhibit A and to this answer as Exhibit No. 1, which said reports, together with the order issued therewith, are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain and prove.

Wherefore, the defendant prays that the complaint herein should be dismissed.

Interstate Commerce Commission, By Nelson Thomas, Attorney, Room 3329, Interstate Commerce Bldg., Washington, D. C. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fols. 41-41a] *Duly sworn to by Clyde B. Aitchison. Jurat omitted in printing.*

[fols. 42-42a] I hereby certify that I have this day mailed a copy of the attached answer of the Interstate Commerce Commission and exhibit thereto to the following:

Robert L. Pierce, Esq., Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

Charles C. Cotterill, Esq., 70 East 45th Street, New York, N. Y., Attorney for Plaintiff.

This 24th day of October, 1942.

Nelson Thomas.

[fol. 43] IN THE DISTRICT COURT FOR THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

In the above-entitled cause, the Court makes the following findings of fact:

1. Plaintiff, for the purposes of this suit, is the legal representative of certain common carriers of property for hire by motor vehicle in interstate commerce and has brought this suit to set aside and annul a certain order of the Interstate Commerce Commission, pursuant to the provisions of the Act of October 22, 1913, (C. 32, 38 Stat. 219, U. S. C. Title 28, sec. 47).

2. Said order, which required the plaintiff and the motor carriers joining in certain rates proposed by them to cancel the same, was made in a proceeding designated Investigation & Suspension Docket No. M-1216, *Rugs and Matting from the East to Western Trunk Line Territory*, and was accompanied by two reports in which the Commission found that said proposed rates were unjust, unreasonable and un- [fol. 44] justly discriminatory. Said reports are reported 31 M. C. C. 193, and 34 M. C. C. 641.

3. That in said proceeding the plaintiff and the motor carriers proposing said rates were accorded a full hearing by the Commission and were permitted to introduce such competent and relevant evidence as they saw fit to

adduce, written briefs and oral argument were received, and upon said evidence, briefs and argument, the Commission made its reports and order.

4. Upon the pleadings, the evidence received by the Commission in the aforesaid proceeding, a certified copy of which has been received in evidence by the Court, and the arguments of counsel, the Court finds that the facts found and reported by the Commission in its said reports were supported by substantial evidence, and the Court adopts said findings as its own.

Conclusions of Law

The Court states the following as its conclusions of law:

1. The Commission's report and order of August 11, 1942, and its prior report of November 17, 1941, were justified by law and the evidence before the Commission, and constitute a valid exercise of the Commission's power under the Interstate Commerce Act.

2. The findings set forth in the Commission's report hereinabove designated, considered as a whole, are sufficient to sustain and warrant the order made by the Commission directing the cancellation of the rates involved in this suit.

3. The evidence heard and considered by the Commission as set out in the transcript thereof, which was introduced in evidence by the plaintiff in this Court, is sufficient in law [fols. 45-46] to sustain the Commission's order in said proceeding and a finding by this Court that said order is supported by substantial evidence.

4. The construction of the law applied by the Commission in its reports and order was and is correct.

5. The record of the proceeding before the Commission indicates that the plaintiff and the motor carriers proposing the rates involved in said proceeding have been accorded the full hearing required by law.

6. The relief which the plaintiff prays should be denied and its suit dismissed for want of equity.

Augustine N. Hand, United States Circuit Judge.
John W. Clancy, United States District Judge.
Edward A. Conger, United States District Judge.

Dated: February 9, 1943.

[fol. 47] In United States District Court, Southern District of New York

C. 19-390

Eastern Motor Carriers' Association, Plaintiff,

against

United States of America and Interstate Commerce Commission, Defendants

Before Augustus N. Hand, Circuit Judge, and Clancy and Conger, District Judges

Charles E. Cotterill, Attorney and Counsel for Plaintiff and Supporting Intervenors.

Thurman Arnold, Assistant Attorney General, Robert L. Pierce, Special Assistant to the Attorney General, for the United States.

Nelson Thomas, Attorney for Interstate Commerce Commission, Daniel W. Knowlton, Chief Counsel, of counsel.

Opinion

Augustus N. Hand, Circuit Judge:

This is an action to set aside and enjoin enforcement of an order of the Interstate Commerce Commission which held certain proposed motor carrier tariffs unlawful upon a finding that the rates were unjustly discriminatory to certain shippers. The commodity to which the rates were to be applied was hard surfaced floor covering. The railroads have a rate of 70% of first-class for shipments of less than 30,000 pounds and 45% of first-class for 30,000 pounds or [fol. 48] more. The motor carriers proposed a rate of 45% of first-class on shipments weighing 30,000 pounds or more; a slightly higher rate (47½% of first-class) for shipments weighing between twenty and thirty thousand pounds; and a rate of 70% of first-class on shipments of less than 20,000 pounds.

The Commission referred with evident approval to the prior finding of Division 3 of the Commission which read as follows:

> "The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight

cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truck-load minimum weight. The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment."

The Commission went on to affirm prior findings of Division 3 that proposed rates of 45 and 47.5 per cent of first-class are not unjust or discriminatory except to the extent that the proposed rates, 45 per cent of first-class, are subject to a minimum of 30,000 pounds.

It made further findings as follows:

"We further find that the proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots.

"As previously indicated, a check of the tariffs discloses that respondents' present rates are either 45 per cent of first class, minimum 20,000 pounds, or 47.5 per cent of first class, minimum 20,000 pounds. As re- [fol. 49] spondent's present bases of rates do not appear to be unjust, unreasonable, or unjustly discriminatory, no order for the future is necessary."

The difficulty with adoption of a rate of 45 per cent on a minimum of 30,000 pounds, when that rate is not allowed to smaller shippers, seems to be that it has no relation to the business of the motor carriers, for they have made no showing of any saving when carrying more than 20,000 pounds. Nor have they showed that a 45 or 47½ per cent rate, or some intermediate rate, for anything beyond 20,000 pounds would not enable them to maintain reasonable competition with the railroads.

The finding that rates of either 45 or 47½ per cent of first-class, minimum 20,000 pounds, would not in themselves be unreasonable does not negative the finding of an unjust advantage to shippers of 30,000 pound lots in cases where shippers of 20,000 pound lots are not given the same treatment. If motor carriers can make money either at 45 or 47½ per cent of first-class, it would seem that the Commission might reasonably require that the advantage given to the larger shippers of over 30,000 pounds should be shared with the smaller shippers of less than 30,000 pounds, since there is no showing that such sharing would work to the unreasonable disadvantage of the carriers, and it clearly would give the smaller shippers the benefit of the lower rate which the larger shippers would enjoy.

As we have already suggested, the proposal of a 45 per cent rate for shipments in excess of 30,000 pounds has no apparent relation to the business needs or the convenience of transportation of the motor carriers. It is a mere adoption on a volume basis of rates for railroad carload lots which have been sanctioned in the case of rail carriers. It is evident that the motor carriers are attempting to com- [fol. 50] pete with the railroads on rates for large shipments and at the same time to make additional profits on smaller shipments by the 47½ per cent rate. Competition between rail and motor carriers may be entirely legitimate, and indeed desirable, provided a greater equality in rates can be preserved between the smaller and the larger shippers. The extent to which competition should be recognized in arriving at just rates is, within reasonable limits, a matter for the expert judgment of the Commission. It does not in itself necessarily determine whether a rate is preferential under Section 3 of the Interstate Commerce Act or unreasonable under Section 1 (5). It is a matter to be given weight by the Commission, rather than an absolute defense. I. C. C.

v. Alabama Midland Ry., 168 U. S. 144, 166; United States v. Illinois Central R. Co., 263 U. S. 515.

The effect of requiring the motor carriers to fix a single low minimum quantity adapted to their equipment is to oblige them, if they are to meet railroad competition, to extend to smaller shippers the advantages of the competitive rate. No reason is advanced why this should not be done in this case. The 45 per cent rate is found to be reasonable and compensatory; there is nothing to show that hardship would result to the carriers from extending a 45 per cent rate, or one between 45 per cent and 47½ per cent, to small shippers as well as to large ones. It appears to us that in deciding this case the Commission has met the requirements of Section 216 (i) of the Motor Carrier Act, in that it has given "due consideration * * * to the inherent advantages of transportation by such carriers, (and) * * * to the need, in the public interest, of adequate and efficient transportation service by such carriers at the [fol. 51] lowest cost consistent with the furnishing of such service * * *". Its disposition of the proceeding before it was right and should be affirmed.

Submit proposed findings upon ten days' notice.

Judgment for the defendants, dismissing the complaint.

Augustus N. Hand, U. S. C. J. Edward A. Conger, U. S. D. J. John W. Clancy, U. S. D. J.

[fols. 52-52g] In United States District Court, Southern District of New York

Civil Action No. 19-390

Eastern-Central Motor Carriers Association, Plaintiff,

Middle Atlantic States Motor Carrier Conference, Inc., Central States Motor Freight Bureau, Inc., Intervening Plaintiffs,

vs.

United States of America and Interstate Commerce Commission, Defendants

Decree and Judgment—Filed March 5, 1943

The above-entitled cause came on for final hearing on November 2, 1942, before a statutory court convened pursuant to the provisions of 28 U. S. C. 41 (28), 43-48, the

parties plaintiff and defendant appearing by their respective counsel, and the Court having received evidence offered on behalf of said plaintiffs and being fully advised in the premises, and on February 9, 1943, having made and filed its findings of fact, conclusions of law and opinion herein, it is therefore

Ordered, Adjudged and Decreed, That the prayer of the plaintiff's herein be, and the same is hereby denied and the suit dismissed at the plaintiff's costs.

This March 5, 1943.

Augustus N. Hand, United States Circuit Judge.
John W. Clancy, United States District Judge.
Edward A. Conger, United States District Judge.

[File endorsement omitted.]

[fol. 53] In United States District Court, Southern District of New York

[Title omitted]

Assignment of Errors—Filed May 5, 1943

Now come Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carrier Conference, Inc., Central States Motor Freight Bureau, Inc., petitioners herein, and present with their petition for appeal herein this their assignment of errors and say that in the record and proceedings in the above-entitled cause and the decree made and entered against them therein on the 5th day of March, 1943, and the final order in the cause denying rehearing on the 17th day of March, 1943, there is error in the particulars hereinafter set forth.

The District Court of the United States for the Southern District of New York erred in making the decree and in dismissing the petition herein in the following respects:

1. It erred in determining that the order of the Interstate Commerce Commission made on November 17, 1941 was within the authority of the Commission and was supported by evidence of record before the Commission.

2. It erred in the failure to state and decide the contentions of petitioners as to the respects in which such order

of the Commission was beyond its authority and not supported by any facts of record before the Commission.

[fol. 54] 3. It erred in holding as a matter of law that there is "discrimination between classes of shippers" within the reach of U. S. Code Title 49, Sec. 316(d) when common carriers by motor vehicle in their tariffs offer to any shipper choice of three different rates per 100 pounds dependent only upon the weight tendered for shipment by such shipper at one time on one bill of lading, there having been no finding by the Commission that either the lowest or next lowest of the three rates depend upon the shipment of quantities greater than within the economic reach of ordinary shippers and there having been no finding by the Commission that the offering of such choice of three rates was a device by means of which some shippers obtained and others were denied by motor carriers the benefit of the lower charges.

4. It erred in determining that while each of the three rates so offered by the motor carriers was, as concluded by the Commission, just and reasonable, discrimination between classes of shippers would exist as forbidden by law because it did not appear that the motor carrier costs of operation would be lower when transporting the largest of the three quantities upon which application of the lowest of the three rates would depend.

5. It erred in determining that while the lowest of the three offered rates (dependent upon the tendering of the largest of the three quantities) corresponded to the railroad carload rates and minimum carload weights and that the motor carriers were meeting such railroad competition thereby, yet that the privilege of meeting such competition with railroads on equal terms may lawfully be denied by the Commission as "discriminatory" between "classes of shippers tendering the different weights" when it does not appear that the difference in rates is measured by differences in operating costs of the motor carriers.

6. It erred in concluding that "within limits" it is for the Interstate Commerce Commission to determine under what [fol. 55] circumstances competition between motor carriers and railroads suffices as a basis for rate distinctions made available to any shipper and dependent only on the weight

of individual shipments that any such shipper might tender at one time.

7. It erred in determining that motor carriers may not lawfully offer in their tariffs to any shippers a choice of three rates dependent upon the quantity tendered for shipment at one time for the reason that if the motor carriers can "afford" the lowest of the three rates they "ought not" to be allowed to obtain the "greater profit" on the next highest rate for the next smallest quantity offered, in the absence of evidence of a difference in carrier operating expense, even though the lowest of the three rates dependent upon the largest of the three shipping weights may be made for competitive reasons to correspond to the railroad carload rates and carload minimum weights.

8. It erred in failing to conclude that in respect to its administrative function of recognizing or not recognizing competition between regulated common carriers as a basis for rate distinction it is imperative that the Interstate Commerce Commission make suitable findings as to the facts and reasons allowing or disallowing the defense of competition in any particular case.

9. It erred in failing to conclude that the Commission gave no reason and made no finding whatsoever as to why in this case the defense of competition was insufficient, and hence that the Commission's action was arbitrary.

10. It erred in failing to set aside the order of the Commission on the ground that the Commission itself declared its disregard of the defense of competition in this instance was only a matter of "policy".

[fol. 56] 11. The court erred in substituting its own judgment for the administrative judgment of the Commission by upholding the Commission's order on the further ground (not employed by the Commission itself) that the offering to any shippers the choice of three rates was conducive to "inefficiency" of motor carrier operation.

12. It erred in failing to set aside the order of the Commission on the ground that it was in law "arbitrary" and beyond the authority of the Commission and without support in the evidence before the Commission.

Wherefore, petitioners pray that said decree entered herein on the 5th day of March, 1943, and the final order of

March 17, 1943, denying rehearing thereof be reversed and that said District Court of the United States for the Southern District of New York be directed to enter a decree granting the petition of petitioners and that said order of the Interstate Commerce Commission be declared void and perpetually set aside, suspended and annulled and that your petitioners be granted such other and further relief as may be appropriate.

(Signed) Charles E. Cotterill, Solicitor for Petitioners.

May 5, 1943.

[fols. 57-59] In United States District Court, Southern District of New York

[Title omitted]

Order Allowing Appeal—Filed May 7, 1943

Upon the entering of the final decree in this cause came Charles E. Cotterill, solicitor and counsel for petitioner, and intervening petitioners, and filed their assignment of errors and petition for appeal, and it is hereby—

Ordered, That an appeal by petitioners in the above entitled cause to the Supreme Court of the United States from the final decree heretofore filed and entered herein on March 17, 1943, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States, said appeal being hereby made returnable as required by law.

It is further ordered that the bond on appeal be and it is hereby fixed at the sum of two hundred fifty dollars ($250).

Augustus N. Hand, U. S. C. J.; Edward A. Conger, U. S. D. J.; John W. Clancy, U. S. D. J.

May 6, 1943.

[fols. 60-61] PLAINTIFF'S EXHIBIT NO. 1

BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. M-1216

In the Matter of: RUGS & MATTING, EAST TO WESTERN TRUNK LINE TERRITORY

Public Utilities Commission of Ohio,

Columbus, Ohio,

March , 1941.

Met, pursuant to notice at 10:00 o'clock a. m.
Before U. E. Conlon, Examiner.

APPEARANCES:

J. E. Haydon, 486 North Main St., Akron, Ohio, appearing for Eastern-Central Motor Carriers Association, Respondent.

L. M. O'Leary, 16th and Central, Fort Dodge, Iowa, appearing for Brady Transfer & Storage Company, Respondent.

W. M. Spaulding, 821 La Salle St. Station, Chicago, Ill., appearing for Chicago, Rock Island & Pacific Railway Co., Protestant.

James A. Gillen and Henry Christianson, 5[illegible] W. Jackson Boulevard, Chicago, Ill., appearing for Western Trunk Line Carriers, Protestants.

[fol. 62] PROCEEDINGS

Exam. Conlon: The Interstate Commerce Commission has set for hearing at this time and place I. & S. Docket No. M-1216, Rugs and Matting, East to Western Trunk Line Territory. This case was formerly assigned before Examiner Borroughs on January 30th and postponed for hearing on March 21st, 1941, before Examiner Conlon.

May I have the appearances for the respondents in this case?

Mr. Haydon: J. E. Haydon, on behalf of the Eastern-Central Motors Carriers Association, Akron, Ohio. I have been admitted to practice before the Commission.

Exam. Conlon: Any further appearances for the respondents in this case?

Mr. O'Leary: L. M. O'Leary, Fort Dodge, Iowa, appearing for the Brady Transfer & Storage Company, of Fort Dodge, Iowa.

Exam. Conlon: Any further appearances for respondents?

(No response.)

May we have the appearances for the protestants in this case?

Mr. Gillen: Henry Christianson and James A. Gillen, 547 West Jackson Boulevard, Chicago, Illinois, appearing on behalf of the Rail Carriers Trunk Line Committee; both admitted to practice and are in the hearing room.

Exam. Conlon: Both are present?

Mr. Gillen: Both are in the hearing room.

[fol. 63] Exam. Conlon: Any further appearances?

Mr. Spaulding: W. M. Spaulding, 821 South LaSalle Street Station, Chicago, Illinois, appearing on behalf of Chicago, Rock Island & Pacific Railway Company.

COLLOQUY

Exam. Conlon: Any further protestants in this case?

(No response.)

Mr. Haydon: May we go off the record for a moment please?

Exam. Conlon: Off the record.

(Discussion had outside the record.)

Exam. Conlon: On the record. Any further protestants in this case?

(No response.)

Are there any interveners in this case?

(No response.)

This Docket will be recessed until such time as we finish Docket No. M-1445, and will be again called at that time.

(At 10:15 o'clock a. m. a recess was taken until 4:15 o'clock p. m.)

Exam. Conlon: The hearing will please come to order.

We will proceed now with Docket No. I. & S. M-1216, Rugs and Matting, East to Western Trunk Line Territory. You may proceed, Mr. Haydon.

Mr. Haydon: Mr. Examiner, before calling my witness in this case, I would like to refer to a letter which appears in the Commission's files, from Chairman J. A. Farmar, of the Western Trunk Line Committee, dated January 2nd, 1941, in which the rails, who, incidentally, filed the protest which [fol. 64] resulted in the suspension of the rates in I. & S. Docket 1216, agree that if the respondents will incorporate a note reading as follows: "Shipments on which freight charges are based on a weight of not less than 30,000 pounds must be received at and transported from the point of origin, from one shipper in one day and on one bill of lading," and if the respondents would petition the Commission for vacation of the order in this case and request authority to incorporate in the suspended schedules the note which I have just quoted, they would be willing to withdraw their protest.

We want to go on record at this time as being entirely agreeable to the incorporation of such a note, in connection with the suspended rates, and, as a matter of fact, we have so agreed in two petitions, which we have previously filed for vacation of the order herein.

Now, we are again agreeing to incorporate such a note, and it is my understanding that the rails that are present here today, are here to substantiate the willingness to withdraw the protest as indicated in Chairman Farmar's letter, on January 2nd, 1941.

Mr. Gillen: The statement made by Mr. Haydon is correct. In other words, the position of the rail carriers, who are members of the Western Trunk Line Committee, protestants, is that they have no objection to the publication of Column 45, "Rates," subject to 30,000-pound minimum with the note which Mr. Haydon referred to as being applicable to those rates.

[fol. 65] Mr. Haydon: And might I ask at this point, isn't it true that your protest in this case was directed to the 30,000-pound, Column 45, rate?

Mr. Gillen: That is correct.

Exam. Conlon: Insofar as protestants in this case are concerned, it is satisfactory to the rails if that rule is put in?

Mr. Gillen: That's correct.

Exam. Conlon: Off the record.

(Discussion had outside the record.)

Exam. Conlon: Off the record.

Mr. Gillen: I would like to make a correction in that statement that I previously made, and where I said Column 45 rate, I referred to the rates which were protested in the protest filed by the Western Trunk Line Committee.

Mr. Haydon: Which reflected Column 45.

Mr. Gillen: That is correct.

Mr. O'Leary: Which we understand, in a measure, are the equivalent of—they were made the basis of Column 45.

Mr. Gillen: Based on commodity rates.

Mr. O'Leary: To the other territories it is all 59K, which is 47½.

Mr. Gillen: Yes.

Exam. Conlon: Do you have anything to say?

Mr. Spaulding: That is our position, also.

Mr. Haydon: Now, Mr. Examiner, with that understand- [fol. 66] ing, apparently we will still have to proceed to introduce evidence, bearing on the reasonableness of the rates, which are under suspension.

Exam. Conlon: That's right.

Mr. Haydon: For the reason that the Commission now has before it a petition to vacate the order, and in that petition it was pointed out that the protestants have agreed to the same thing which is agreed upon here, and yet the Commission did not lift its order, so, we are prepared to proceed and show what, in our opinion, at least, very definitely proves the reasonableness of the suspended rates, and to do that I will call Mr. O'Leary.

Exam. Conlon: You may proceed.

Mr. Haydon: I will pass out these exhibits 1, 2, 3, 4, and 5, first, and I will ask the reporter to mark them for identification at this time.

(Exhibits 1, 2, 3, 4, and 5, inclusive, Witness O'Leary, were marked for identification.)

L. M. O'LEARY was sworn and testified as follows:

Direct examination.

By Mr. Haydon:

Q. Mr. O'Leary, have you given the reporter your name and address?

A. The name is L. M. O'Leary, Fort Dodge, Iowa.

Q. With whom are you connected?

A. With the Brady Transfer & Storage Company.

[fol. 67] Q. In what capacity?

A. General traffic manager.

Q. As traffic manager——

A. Yes, sir.

Q. Are you required, among other things, to establish rates for application over your line?

A. Yes.

Mr. Christianson: The protestants admit Mr. O'Leary's qualifications. Very glad to do it.

Exam. Conlon: It is so stipulated, then.

By Mr. Haydon:

Q. Mr. O'Leary, have you prepared an exhibit showing the present rates on linoleum under suspension herein, with the proposed rates and the present rail rates from New York, Philadelphia, and Boston, to points in the Western Trunk Line Territory?

A. I have, in Exhibit 1, of three pages, I have shown the present rates to the thirty-four towns in Western Trunk Line Territory. The first statement being from New York, as representative. Philadelphia as representing that district which includes Camden and Marcus Hook and Boston, which includes East Walpole as origin. I have shown the mileage taken from the Hobman's Guide. The present rate on the basis of 20,000 pounds——

Q. At Column 50?

A. —at Column 50 there is four corrections with the rates in there, the present rates to Minneapolis, Minnesota Trans-[fol. 68] fer, St. Paul, and Sioux Falls, South Dakota, have been changed on September 25, 1940, and put in another tariff and made Column 55. These rates should be to the Twin Cities $1.31; to Minneapolis, Minnesota Transfer, and St. Paul, $1.31, and $1.42 to Sioux Falls.

The proposed rate, as shown on 20,000 pounds, on 30,000 pounds, and the mile earnings are based on 22,000 pounds, which is the average loading from the Eastern Territory on this hard-surface floor covering, and the last column is the rail rate.

Q. Now, in every instance, Mr. O'Leary, doesn't your exhibit show that the present rail rate is lower than either your 20,000-pound or your proposed 30,000 pounds?

A. Yes, the proposed rate on 20,000 pounds is based on Column 50K, which is 47½ cents per first-class. On the 30,000-pound proposed basis it is on Column 45. The rail basis to these thirty-four points is equivalent to Column 42½.

Q. Which basis was permitted to go into effect through the Commission's decision in I. & S. Docket No. 4766?

A. 4766?

Q. And 4767.

A. And 4767. To the other portions of the territory, Western Trunk Line Territory—is that under suspension, that I know of, or just these commodity rates? Aren't our exceptions under suspension, also?

[fol. 69] Mr. Haydon: Possibly at this time, Mr. Examiner, we probably should state what is in issue. I don't believe we did that.

Exam. Conlon: No, you didn't.

Mr. Haydon: The matter under suspension is an exceptions rating of Column 50K, minimum 20,000 pounds, named in Agent Everett H. Russell's MF ICC No. 7.

The Witness: Is that No. 7?

Mr. Haydon: That was the exceptions tariff in effect prior to his present exceptions, MF ICC No. 31. In addition to his Column 50K rating, minimum of 20,000 pounds, there is also under suspension the matter of specific commodity rates named in Item 1141-10, Supplement 125, of Agent Russell's MF ICC No. 26. These specific commodity rates reflected on 20,000 pounds, Column 50K, and on 30,000 pounds, Column 45. It was necessary to establish specific commodity rates on the basis of Column 50K, minimum 20,000 pounds, to the points at issue for the reason that we were at the same time publishing Column 45, minimum 30,000 pounds, and in order for the two bases to alternate, we had to publish specific column 50K rates, which we otherwise would have had under the proposed exceptions Act.

Now, the Commission has suspended the exception rating Column 50K, along with the specific commodity rates, which, likewise, reflect Column 50K along with the commodity rates which reflect Column 45, with a minimum of 30,000 pounds.

[fol. 70] Exam. Conlon: All right, proceed.

By Mr. Haydon:

Q. Now, Mr. O'Leary, in connection with that Exhibit No. 1, will you state for the record what it actually cost you on an average to handle traffic between points in the East and points in Western Trunk Line Territory?

A. In truckload it will average just one fraction over 15 cents per truck mile.

Q. On truckload?

A. Yes, sir.

Q. How did you arrive at that figure?

A. We segregated part of it on some of our owner-operator, and then we tried some of it, not segregating all of them, but all the loads, to arrive—but, what we did was take as the owner-operator, we have to pay three cents a running mile; that is why we can take care of the mileage now; $5.75 for the tractor and $1.25 for the trailer; these aren't our figures; these we call the Eleven States Agreement. I have added to that everything in our operating statement, with the exception of equipment, maintenance, and depreciation expense. In other words, I put in there the terminal expenses, as well as tariff and advertising, insurance, safety expense, and the administration expense.

Q. Now, Mr. O'Leary,——

A. That brings it down to 15.155, and that includes the terminal expense we have to pay on LTL shipments.

[fol. 71] Q. But it doesn't include the handling of less-than-truckload traffic?

A. It does include the handling of less-than-truckload traffic at terminals.

Q. Why does the figure that you just mentioned, differ from the figure which you introduced in another case today?

A. That differs because included in that latter figure you spoke of, our twenty-one certificated regular routes in Northwest Iowa and between Nebraska and Iowa, where we make these little towns, four, five miles apart, where the cost of delivering and the hours we have to pay in addition

to the three cents a mile, is more than the driving cost, where we pay $3.75 for the driving cost; on a typical run we would pay $4.00 in addition, at 80 cents an hour at the time he was loading and unloading, or delivering at the stores. There are two hundred and twenty-five towns in those twenty-one routes, and about 75 per cent of them, it is all small towns, we don't have a dock. We don't have an agent. We deliver direct to the consignee by our road truck, and that, of course, brings the mileage cost up considerably.

Q. Is there any rate on your Exhibit No. 1, which does not yield over and above your actual expense per mile, in handling truckload traffic?

A. It does not. There isn't a figure on there that would. There are two spots on the 30,000 pounds, based on the 20,000 pounds that would be less than our average for the [fol. 72] year 1940, and that would be from Boston; three of them; from Boston to Cedar Rapids, Chillicothe, Missouri, and Ottumwa, Iowa.

Q. But the figure that you referred to, 17.——

A. —548.

Q. Included your handling of less-than-truckload traffic, and included the handling of traffic over your docks?

A. Oh, yes, indeed.

Q. Whereas, with respect to these rates under suspension there is no handling over the dock, no terminal expense, is that correct?

A. The only terminal expense that there would be, would be the supervision and the billing.

Q. Which attach to every transaction?

A. Yes; the terminal expense runs high, runs better than three cents over the entire system.

Q. So, your rates shown on Exhibit No. 1, not only are higher than your out-of-the-pocket cost, but they are higher than your cost, including all items of cost, and they do yield a profit?

A. Yes, sir, they will.

Q. Do you have another exhibit showing the rates that were formerly in effect?

A. Yes, I have Exhibit No. 2, that shows the comparison of the respondents' present suspended rates, on hard floor coverings, with rates in effect prior to July 10th, 1940, and on July 10, 1940, the commodity rates then in effect in Rus- [fol. 73] sell's Tariff MF ICC No. 26, were cancelled.

Q. Why were they cancelled, Mr. O'Leary?

A. We wanted to meet the rail rate on the nose, as far as rates were concerned, but kept the minimum at 20,000 pounds. We increased the rates and increased the minimum.

Q. At the time a proposal was filed to cancel the then existing commodity rates, wasn't it a fact that the rail basis was Column 50?

A. It was.

Q. And your proposal contemplated the elimination of all your commodity rates in effect at that time, so as to place your rates on the same level as the then existing rail rates?

A. The same level, only a minimum of 20,000 instead of 30,000 pounds.

Q. Then, after the cancellation of the commodity rates, which you previously maintained, and which are shown——

A. In Column 2.

Q. —in Column 2, on Exhibit No. 2, didn't the rails reduce their classification basis to Column 45?

A. Yes, they did and to thirty-four towns they also put in the commodity rate at approximately 42½.

Q. Of course, those commodity rates were suspended?

A. Yes.

Q. But on the Column 45 classification basis it did go into effect?

A. Yes.

[fol. 74] Q. And left you then with Column 50, as against the rail column, 45?

A. Yes, and against the motor classification basis 45, we couldn't use it, it was suspended.

Q. You couldn't use it, as I understand it, because your bottom class rates in Russell's Tariff were Column 50.

A. Yes.

Q. Then, though you had 45, in which classification it was of no use to you——

A. No use to us.

Q. Then, to equalize the situation brought about by the publication of Rail Column 45, did I understand that you attempted to establish specific commodity rates?

A. We put in commodity rates to the thirty-four towns in Western Truck Line territory, where the rails put in rates on the basis of 42½, we put in two rates, one on

30,000 pounds, Column 45, and to the same towns, 20,000-pound minimum, Column 50K, or Column 47½.

Q. Mr. O'Leary, your previous commodity rates in effect on July 10th, 1940, carried with them the minimum weight of 18,000 pounds, did it not?

A. Yes, sir.

Q Isn't it true, also, that your proposed commodity rates from, for example, Boston, Massachusetts, on Exhibit No. 2, based on 20,000 pounds, are in every instance higher than the commodity rates which you maintained [fol. 75] prior to July 10, 1940, with 18,000-pound minimum?

A. Not in every instance. In all but three instances from Boston, they were; to Kansas City, St. Jo, and Springfield, they are the same.

Q. But in every instance——

A. Were the specific commodity rate; they were.

Q. With respect to your proposed 30,000-pound rate, isn't it a fact that they were closely approximate the commodity rates formerly in effect; that is, the difference isn't over two or three or four cents?

A. That's true. They run—they are not over two or three cents' difference.

Q. That is true throughout the Exhibit; isn't that right?

A. That is true; $1.13 to Sioux City, and we had $1.10 in.

Q. Isn't it true that if you had no desire to bring your rates up to the rail level, which was in effect prior to July 10, 1940, and had maintained your then existing commodity rates, that you would have a basis on 20,000 pounds lower than proposed in this proceeding?

A. We would have a basis of 18,000 pounds lower than in this proceeding.

Q. Yes, and you would have rates with 18,000-pound minimum on a very, a slightly in excess of the 30,000-pound rates?

A. In larger towns, in Omaha, Sioux City would be less than the proposed 30,000.

[fol. 76] Q. Now, on Exhibit 3——

A. Exhibit No. 3 is a statement showing the suspended rates on the twenty and thirty thousand pounds from Boston, East Walpole, Kearny, and New York, as representative with the rates published by Keeshin, and in effect today, Agent D. O. Barrett, in his MF ICC No. 36, on 18,000-pound minimum.

Q. Now, these rates shown on this exhibit, for the account of the Keeshin Motor Express Company, are the same as you formerly maintained, prior to July 10, 1940.

A. Where we voluntarily cancelled on July 10th, 1940.

Q. Keeshin didn't go along with you and still maintains his rate?

A. And still maintains his rate.

Q. So, Keeshin has 18,000-pound rates, which are lower than your 20,000-pound rates?

A. That is true in every instance.

Q. And Keeshin does handle traffic from points in the East to the Western Trunk Line Territory?

A. Yes, into the Twin Cities. In this case, our proposal to Minneapolis should be changed to St. Paul; that is all. We show $1.20, like from Kearny to New York, to the Twin Cities. Our lowest rate would be $1.21. It is the lowest rate we have got now, but this is the one that is suspended, I would say the difference between what Keeshin has now and what we have now, he got $1.12 against our $1.21.

[fol. 77] Q. However, the exhibit is O. K.?

A. The exhibit is O. K.

Q. Turn to Exhibit 4.

A. That is the comparison with Eastbound rates, on dairy products, compared with hard-surface floor covering.

Q. You handle a considerable quantity of dairy products from points in the West to Eastern territory?

A. Yes, we do.

Q. Do you care to indicate, approximately, the percentage of your total eastbound traffic, represented by the movement of dairy products?

A. Eastbound traffic to the Atlantic Seaboard, from points West of the Mississippi River, are 92 per cent in 1940, was dairy products.

Q. The large preponderance of your tonnage, then, constitutes dairy products?

A. Dairy products, yes.

Q. So, on your Exhibit No. 4, as I understand the exhibit, you compare your westbound suspended linoleum rates with your eastbound presently effective dairy product rates?

A. Yes.

Q. Isn't it true that in only four instances are your present dairy product rates, eastbound, higher than both of your suspended westbound linoleum rates?

A. That is correct.

[fol. 78] Q. Isn't it also true that in many instances your eastbound dairy products rates are the same as, or lower than, your suspended westbound 30,000-pound linoleum rates?

A. They are.

Q. And those instances are indicated on the exhibits, as I understand by the underscored figures.

A. Yes, the last column.

Q. That is the last column under Boston, and the last one under New York, and the last under Philadelphia?

A. Yes.

Q. Now, in connection with your movement of eastbound dairy products, isn't it true that you provide refrigeration?

A. We do.

Q. And your minimum is only 18,000 pounds?

A. No, the minimum has now become 20,000 pounds.

Q. From all points shown on this exhibit?

A. I believe you will find the dairy products have gone to 20,000 pounds all over.

Q. In no instances, in excess of 20,000 pounds?

A. No.

Q. However, you aren't able to state definitely it is 20,000?

A. I will state definitely that in every territory in the Western Trunk Line, except in this case where the rates to the East are exactly the same rates from Iowa, Nebraska, Minnesota, and North and South Dakota, the rates are rail [fol. 79] rates, plus five cents per hundred on the minimum.

Q. In other words, the rates eastbound have been based on rail rates, either the same as the rail or five cents over?

A. I said Nebraska—I want to take out two towns, Falls City and Omaha, were left on the rail basis without the five cents.

Q. Then, according to the exhibit, isn't it true that your earnings on westbound linoleum, under the suspended rates, would be higher than the earnings on your eastbound dairy products movement?

A. They would for 1940, but if we handled the same amount of linoleum as we handled for dairy products for the

same distance, for the same rates, we would have made $39,850, because that is what we paid for dry ice.

Q. As I understand it, the preponderance of your tonnage moves eastbound?

A. The preponderance of our tonnage is dairy products moving eastbound.

Q. Doesn't the preponderance of your tonnage move eastbound; far more eastbound than you do westbound?

A. From this territory, yes.

Q. Although eastbound tonnage, I understand, 90 per cent constitutes dairy products?

A. 90 per cent west of the Mississippi River, going East to the Atlantic Seaboard.

Q. Now, your Exhibit No. 5.

[fol. 80] A. Exhibit No. 5 is the statement showing a comparison of present and proposed rates on hard-surface floor covering, from Boston, Massachusetts, with—which includes, of course, East Walpole—with the present rates on fresh, frozen, or salted fish, from Boston, Massachusetts to points in Western Trunk Line Territory. We have shown, the first rate there; the commodity rates, on 22,000 pounds from various points in this district. The second is the exception rate, of Column 50, on 20,000 pounds. The third column are the present rates on hard-surface floor covering, and the last two columns are rates on proposed and suspended linoleum rates.

Q. Referring to the first point, Atchison, Kansas, your present linoleum rate is $1.32?

A. Yes.

Q. Your present fresh fish rate, in the reverse direction,—no, in the same direction——

A. Same direction.

Q. Pardon me. —is $1.32?

A. Yes.

Q. In other words, you maintain today the same rate on linoleum as you do on fresh fish; is that correct?

A. That's correct.

Q. Now, can you handle, or do you handle, 22,000 pounds of fresh fish?

A. We do.

Q. You handle 22,000 of linoleum?

[fol. 81] A. Yes.

Q. You ice the fish?

A. Yes.

Q. You ice linoleum?

A. We don't.

Q. In your opinion, should the earnings on—or the rate on linoleum from Boston to Atchison be higher than that on fresh fish?

A. It should be lower.

Q. It should be lower. Now, under your proposed linoleum rate it is $1.26 on 20,000 pounds, and $1.18 on 30,000 pounds?

A. That is Atchison, Kansas?

Q. Yes.

A. Yes.

Q. You consider those rates entirely proper, by your present rates on fish, from Boston to Atchison?

A. I think they are fairly comparable, and reflect the difference in transportation costs.

Q. Not so much handling involved in the movement of linoleum as there is in the movement of fish, is there?

A. There isn't, and there is no hazard. As you move fish, the fish have to — kept at 20 degrees above zero.

Q. You do handle fish from Boston to the Western Trunk Line Territory?

A. Yes.

[fol. 82] Q. How much of your total is fish?

A. I couldn't give you that. In 1940 handled 19,940,000 pounds of fish from Boston; not this entire territory.

Q. The big percentage of your total movement is fish?

A. A thousand truckloads; pretty close to it.

Q. Kansas City, Missouri, your present linoleum rate is $1.32, and your present frozen fish rate is $1.18.

A. Yes.

Q. You are 14 cents higher on linoleum than you are on fish to Kansas City?

A. Yes, I get it; Kansas City, that's right.

Q. What rates are you proposing on linoleum from Boston to Kansas City?

A. $1.26 on the 20,000 pounds; $1.18 on the 30,000 pounds, which latter rate is applicable on fresh fish, frozen, on the basis of 22,000 pounds.

Q. So, your proposed present rate on 20,000-pound rate on linoleum from Boston to Kansas City is higher than your present fish rate from Boston to Kansas City?

A. Yes. I might explain, to keep the record clear, that the $1.18 is 22,000 pounds on fish, and these commodity

rates in the first column, we don't pay for the ice. We do for the rates in the second column, on 50. We don't pay for the ice on the others. We have a provision that the shipper should pay for the ice.

[fol. 83] Q. Do you have any further evidence?

A. I have nothing further.

Q. Let me ask you this question, please: Are you familiar with the Commission's decision in Docket No. 28041, involving rates on linoleum from Eastern producing points to points in the Southern territory?

A. Yes, I understand that they allow the rates on Column 45, minimum 30,000 pounds.

Q. To become effective by rail?

A. And motor carrier.

Q. And motor carrier?

A. Yes.

Q. With the understanding that a note similar to that stipulated in the record this morning, would be attached to the rates?

A. Yes, 30,000 pounds by motor carrier, and, I believe, it is no more than right that we should have such a stipulation, rather than take 10,000 one day and 20,000 the next.

Q. Mr. O'Leary, prior to the cancellation of your specific commodity rates on July 10, 1940, did you handle a substantial portion of the tonnage which moved by the motor carriers to Western Trunk Line points?

A. We had substantial tonnage. We handled in 1939, that is, the last full year, I believe it was 398 truckloads to Western Trunk Line Territory, to the origins, from Trunk Line, in New England.

[fol. 84] Q. In handling that, did you compete with other motor carriers operating to and from the same territory that you operated to?

A. Oh, yes.

Q. What were those carriers, the names of those carriers?

A. Well, there is Keeshin, is one of them; Ohio-Nebraska, is another one; probably a dozen of them.

Q. Did you compete with Cooper-Jarrett?

A. Yes, Cooper-Jarrett, Spector, Monark.

Q. Adams Transfer & Storage Company?

A. Adams Transfer & Storage Company.

Q. Of course, you can't put into this record the tonnage that those carriers handled, but you did compete with them

and you had to do your utmost in the solicitation of business to keep abreast with them, is that correct?

A. That's correct.

Q. Would you venture to suggest that these other carriers probably handled as much of this linoleum westbound, as you did?

A. Well, I couldn't say that; I don't know a thing about them, so, I'm not going to answer you.

Mr. Haydon: I believe that is all, Mr. Examiner.

By Mr. Haydon:

Q. Do you have anything to add?

A. Nothing to add. I might add one thing, that we had since these rates were suspended, four loads from the Western Trunk Line Territory, instead of 398, and three of those we haven't collected the charges on, because the rate was too high, and we haven't been able to collect the [fol. 85] charges.

Exam. Conlon: Gentlemen, do you have any questions?

Mr. Gillen: No questions.

Mr. Haydon: That concludes our case, and I ask that respondent's Exhibits 1 to 5, inclusive, be accepted in evidence.

Exam. Conlon: Any objection?

Mr. Gillen: No objection.

Exam. Conlon: No objections, Exhibits 1 to 5 will be received in evidence.

(Exhibits 1 to 5, inclusive, Witness O'Leary, received in evidence.)

Mr. Haydon: Now, Mr. Examiner, I would like to make another motion. I would like to move at this time that the Commission give immediate consideration to the vacation of their suspension order in I. & S. Docket No. M-1216, and particularly so since we have previously filed two petitions, asking for the vacation of this order, and to date we have submitted evidence to show that the suspended rates are reasonable and that they yield a profit over and above the cost of operation, and by reason of the fact that the rates are being denied to the respondents, these respondents are being injured in that they can't successfully compete, not only with the rails, but with the Keeshin Motor Express, who maintain rates on a lower level to many of the destina-

tions involved herein. In addition, the record shows that the protestants and respondents have reached an agreement, which permits the protestants to withdraw entirely any objections that they may have previously expressed. [fols. 86-86b] For that reason, I ask the Examiner to immediately refer this case to the Commission, with a view to having the suspension lifted immediately.

Exam. Conlon: The motion will be received, Mr. Haydon, and it will be given careful consideration.

Mr. O'Leary: May the record also show that the Brady Transfer & Storage Company joins in that motion.

Exam. Conlon: The record may so show.

Is there anything else to come before this hearing?

(No response.)

Let the record show that two free copies of the transcript are to be given to the parties. Mr. Gillen will be given one free copy for the protestants, and the copy for the respondents will go to Mr. Haydon.

There being nothing further, you may consider the case submitted.

(Hearing concluded at 5:15 o'clock p. m.)

[fol. 87] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS RELIED UPON BY APPELLANTS AND THEIR DESIGNATION OF MATERIAL PARTS OF THE RECORD TO BE PRINTED—Filed Oct. 11, 1943

I

The decision of the court below was not in any respect responsive to the contentions made by the appellants concerning the features of illegality of the report and order of the Interstate Commerce Commission.

II

The Commission selected this as a test case for its disposition of a very important matter of transportation rates. In clear intent and in fact its majority decision would cut across and condemn as unlawful a large part of the entire motor common carrier rate structure in this country. It would drastically alter the competitive rate equilibrium as between the motor carriers and railroads with respect to

much of the traffic now fairly shared between them. It would prevent achievement of a competitive equilibrium ex [fol. 88] cept by a virtual allocation of traffic as between the two different forms of transportation agencies which otherwise would be competitive—something entirely beyond the Commission's present authority.

III

With complete candor of chosen language the Commission in its report and order reveals that its stated ultimate conclusion of unlawfulness of the involved motor carrier rates was arrived at as a result of a "policy" of its own. But the Commission wholly lacked authority thus to impose a "policy" of its own creation, not found in any provisions of the statute which it administers. (*Southern Pacific R. Co.* v. *I. C. C.*, 219 U. S. 43; *I. C. C.* v. *Union Pacific R. Co.*, 222 U. S. 541, 554; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515, 525). "Congress has made the policy judgment" (Mr. Justice Black in *I. C. C.* v. *Inland Waterways Corp.*, decided by the Supreme Court June 14, 1943). When, therefore, so boldly the Commision announced that its decision and order were the result of its own "policy" the validity of its action is not to be sustained merely because it couched its ultimate conclusion of illegality in the mere terms of the statute that the involved rates would be "discriminatory" and "unreasonable".

IV

Whatever may be the carriers' motive they are not guilty of unlawful "discrimination between shippers" merely by openly publishing in their tariffs a choice of three rates per one hundred pounds dependent only upon the quantity offered for shipment at one time on one bill of lading from one origin to one destination, when *any* shipper is at full liberty at any time and place to exercise its mere choice of shipping weight well within the limits of ordinary commercial units of sale. The Commission's majority decision to [fol. 89] the contrary was erroneous in the light of the Supreme Court's decisions in *Penn Refining Company* v. *Western N. Y. R. R. Co.*, 208 U. S. 208, 221; *I. C. C.* v. *Diffenbaugh*, 222 U. S. 42. The case is easily distinguishable from others in which both the Commission and Supreme Court have determined that the mere open tariff publication of a conditional choice of rates may nevertheless be unlaw-

fully discriminatory if the seeming choice is beyond the ordinary economic reach of all but a few and restricted type of shippers. (*U. S.* v. *Chicago Heights Trucking Company*, 310 U. S. 344; *B. & O.* v. *U. S.*, 305 U. S. 507). Here the Commission made no finding that there are any "classes" of shippers as between whom there are serious economic infirmities which would disenable any of them freely exercising the optional choice of rates. It was not found that anything would be granted to any shipper or class of shippers and *denied* to another. The fallacy of the Commission's conclusion of unlawful discrimination is the same as it would be to say that a retail drug store is "discriminating" between its customers by offering to sell one tube of toothpaste for 25¢ or two for 40¢. As there would be no discrimination in fact in such an unrestricted choice offered the purchaser there can be no proper conclusion of unlawful discrimination under the statute. Neither the Commission nor the Supreme Court found any fault with a similar choice of graduated rights in the *Mississippi Valley Barge Case*, 292 U. S. 282.

V

As to the conclusion of unreasonableness: the rates of 70 per cent, 47.5 per cent and 45 per cent of first class, in terms of per one hundred pounds, were deemed by the Commission neither too high nor too low. It was con- [fol. 90] cluded, however, that for the motor carriers to govern the lowest of the three rates by the requirement that not less than 30,000 pounds be tendered for shipment at one time on one bill of lading from one consignor to one consignee would be unlawful because "unreasonable". The point made by the Commission majority was that since the record failed to show the motor carriers' operating expense per one hundred pounds would be less when transporting 30,000 pounds than when transporting 20,000 pounds the lowest of any of the rates should not be conditioned by the requirement that more than 20,000 pounds shall be tendered as a single shipment. In short, as to customary trade units of commercial sale of various commodities the Commission majority would disallow to motor carriers the right to govern their quantity rates by the same requirements as to shipping minimums which govern railroad rates. Whereas railroad carload rates are governed by required minimum shipping weights which express the ordinary commercial

units of sale the Commission majority would force the motor carrier industry to make their quantity rates available to shippers on substantially less shipping weights than the ordinary units of sale. No reason or finding is set forth in support of this drastic conclusion other than the "policy" of the Commission to bring about the change. The only attempted support of that mere "policy" rests upon nothing more than the negative requirement that before motor carriers may govern their quantity rates by customary trade units of shipment it is incumbent upon them to establish that their operating costs per one hundred pounds are lower for the larger quantity. No injury to any shipper was found. No injury to the motor carriers was found. No requirement was imposed that motor carriers may not ac- [fol. 91] cept shipments weighing 30,000 or more pounds at one time. The Commission's majority decision would impose the inelastic rule (never heretofore applied to transportation rates) that a rate or regulation is lawful or not only in accordance with its relation to carrier operating expense. But there is no requirement in the statute that each and every transportation rate and regulation must be measured solely with respect to operating cost. Principles of freight classification in accordance with relative "values of service" and the adaptation of rates to competitive and commercial necessities and conditions would be forbidden under such a rigid application of the sole test of mere operating expense. Nothing in the statute reveals the Congressional intent that only cost accounting methods are to be applied in determining the reasonableness of transportation rates and regulations.

VI

In the case of *Barringer & Co.* v. *U. S.*, No. 520, October Term, 1942, the Supreme Court determined that railroads might adapt their rates to motor carrier competition within the limits allowed by the statute. There, the railroads were competing with motor carriers. Here the motor carriers are competing with railroads. 45 per cent of first class is the railroad rate basis on carload shipments of linoleum when offered in quantities of 30,000 pounds or more. The motor carriers seek to charge 47.5 per cent of first class on the smaller shipping weight of 20,000 pounds and to meet the railroad carload rates of 45 per cent on the larger shipping weight of 30,000 pounds. By the action of the Com-

mission majority in the present case motor carriers would be required either to make their 45 per cent of first class rates available on the smaller shipping weight of 20,000 pounds (being less than the railroad requirement) or else [fol. 92] to charge more than the railroad carload rates per one hundred pounds in consideration of the lower shipping weight. That requirement is purely "arbitrary" as denounced by the three Commission dissenters. It would take from the motor carriers the statutory right of fairly adapting their rates and regulations to their competitive necessities. Congress has not forbidden fair competition nor required unfair competition. In its declaration of "National Transportation Policy" (U. S. Code, Title 49, Sections 27, 301 and 901 Notes) Congress has forbidden only "destructive" competition. It has preserved the right of "fair" competition between transportation agencies. In the absence of specific findings as to competitive excesses it is required that the Commission recognize the right of fair competition. (*Mississippi Valley Barge Case*, 292 U. S. 282; *Milwaukee Coal Case*, 294 U. S. 299; *U. S.* v. *Ill. Cent. R. Co.*, 263 U. S. 515; *Scandrett Case*, 32 Fed. Supp. 995, affirmed 312 U. S. 661). Here the Commission found no forbidden excess of competitive effort by the motor carriers. It did not find threatened destructive injury to the railroads but on the contrary noted the withdrawal of railroad protest early in the hearing. It did not find any malicious purpose by the motor carriers. It did not find that the motor carriers had gone beyond what their competition with railroads required. It did not find that an undue burden on the other traffic of the motor carriers would be cast by this meeting of railroad competition on equal terms. It did not find that the legitimate competitive interests of the motor carriers would as well be served by different rates and minimum weights than those proposed. In short, the Commission merely determined a "policy" of its own not to recognize the competitive situation which the record before it presented.

[fol. 93]

VII

Relying upon *U. S. v. Ill. Cent. R. Co.*, 263 U. S. 515 the Commission majority rejected the consideration of competition only because of the assumption that in such decision the Supreme Court allowed it the right to recognize competition or not as it should please and without any

supporting findings. But the Supreme Court meant no such thing. It did not intend to give to the Commission an autocratic power of economic dictatorship over transportation rates. While allowing to the Commission a proper administrative function in determining the weight to be given to competition in rate making the Supreme Court never meant that the Commission may allow or reject competition in a purely arbitrary way, merely as a matter of its own "policy", without any adequate findings under the law to support its action in a given case.

VIII

The Commission did not put its decision upon any ground of efficiency or inefficiency of operation of motor carriers such as the court below suggested might have been a supporting ground for the Commission's decision.

Appellants designate the following portions of the record to be printed as material to the points upon which they rely:

1. The transcript of evidence taken before the Commission, omitting the tabular exhibits and the oral argument of counsel.
2. The report and order of Division 3 of the Commission.
3. The report of the full Commission.
4. The complaint to the United States District Court for the Southern District of New York.
5. Opinion of the District Court.
6. Appellants' Assignment of Errors.

Respectfully, Charles E. Cotterill, 70 East 45th Street, New York, N. Y., Attorney for Appellants.

[fol. 94] [File endorsement omitted.]

[fol. 94a] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED —Filed October 21, 1943

Pursuant to Rule 13, Paragraph 9, of the Rules of the Supreme Court appellees designate the following portions of the record to be printed in the above-entitled case, in

addition to those portions heretofore designated by appellants:

1. Answers of the defendants United States and Interstate Commerce Commission.
2. Findings of Fact and Conclusions of Law of the District Court.
3. Judgment of the District Court.

Charles Fahy, Solicitor General.

[fol. 95] October 20, 1943.

Charles E. Cotterill, Esq., 70 East 45th Street, New York, N. Y.

Re: Eastern-Central Motor Carriers Association, et al. v. United States and Interstate Commerce Commission, No. 105

Dear Mr. Cotterill:

I enclose herewith copy of designation of additional parts of the record to be printed. This was filed in the Supreme Court today. Please acknowledge receipt.

Sincerely yours, Charles Fahy, Solicitor General.

[fol. 96] [File endorsement omitted.]

[fol. 97] Supreme Court of the United States

Order Noting Probable Jurisdiction—October 11, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,597. Southern New York, D. C. U. S., Term No. 105. Eastern-Central Motor Carriers Association, Middle Atlantic States Motor Carrier Conference, Inc., and Central States Motor Freight Bureau, Inc., Appellants, vs. The United States of America and Interstate Commerce Commission. Filed June 16, 1943. Term No. 105 O. T. 1943.